PUBLICATION UPDATE

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Ohio Jury Instructions—Civil

Publication 4346 Release 22S2 September 2022

HIGHLIGHTS

This release includes revisions to the following:

- User's Guide
- Chapter CV 303 — Standards of Proof
- Chapter CV 315 — Damages
- Chapter CV 425 — Governmental Liability
- Chapter CV 455 — Civil Relief for Criminal Conduct
- Chapter CV 501 — Contracts
- Chapter CV 533 — Discrimination
- Chapter CR 509 — Arson and Related Offenses
- Chapter CR 513 — Theft and Fraud
- Chapter CR 521 — Offenses Against Justice and Public Administration
- Chapter CR 525 — Drugs

Chapter CV 303 adds new instruction on self-defense, defense of another, defense of residence in tort actions.

Chapter CV 315 replaces one instruction on personal injury: tort actions.

Chapter CV 425 includes one revised instruction on negligence in proprietary functions R.C. 2744.02(B)(2), one revised instruction on maintenance of roads and bridges R.C. 2744.02(B)(3), and one revised instruction on negligence within government buildings or grounds R.C. 2744.02(B)(4).

Chapter CV 455 replaces one instruction on civil remedy for person injured by criminal act.

Chapter CV 501 replaced in its entirety to include one new instruc-

tion on each of the following: breach of contract, contract formation, offer and acceptance, contract interpretation, modification of contract, affirmative defense: mutual mistake of fact, affirmative defense: unilateral mistake of fact, affirmative defense: frustration of purpose, affirmative defense: impracticability, affirmative defense: impracticability due to government action, affirmative defense: prevention of performance, affirmative defense: payment (satisfaction), affirmative defense: accord and satisfaction, affirmative defense: waiver, affirmative defense: duress, promissory estoppel, expectation damages, reliance damages, rescission and restitution, and quantum meruit: mistake/implied in fact contract.

Chapter CV 533 replaced in its entirety to include one new instruction on each of the following: general, disparate treatment claim—indirect evidence, disparate treatment claim—some direct evidence, disparate (adverse) impact claim, disability discrimination, reasonable accommodation, sexual harassment - loss of tangible job benefit, sexual harassment - hostile work environment, retaliation, constructive discharge, and damages in discrimination cases.

Chapter CR 509 includes one revised instruction on soliciting or providing support for terrorism R.C. 2909.22 and one revised instruction on money laundering in support of terrorism R.C. 2909.29.

Chapter CR 513 adds one new instruction on counterfeiting R.C. 2913.30, one new instruction on illegally transmitting multiple commercial electronic mail messages (spamming) R.C 2913.421(B), and one new instruction on unauthorized access of computer R.C 2913.421(D).

Chapter CR 521 replaces one instruction on soliciting improper compensation (coerced contributions) R.C. 2921.43(C), one instruction on dereliction of duty (public servant) R.C. 2921.44(E), one instruction on impersonating a/an (peace officer) (private police officer) (federal law-enforcement officer) (investigator of the Ohio Bureau of Criminal Identification and Investigation) R.C. 2921.51(B), one instruction on impersonating a/an (peace officer) (private police officer) (federal law-enforcement officer) (investigator of the Ohio Bureau of Criminal Identification and Investigation) in connection with a/an (arrest) (detention) (search) R.C. 2921.51(C), one instruction on impersonating a/an (peace officer) (private police officer) (federal law-enforcement officer) ([officer] [agent] [employee] of the state) (investigator of the Ohio Bureau of Criminal Identification and Investigation) to commit or facilitate an offense R.C. 2921.51(D), and one instruction on impersonating a/an (peace officer) (private police officer) (federal law-enforcement officer) ([officer] [agent] [employee] of the state) (investigator of the Ohio Bureau of Criminal Identification and Investigation) while committing a felony R.C. 2921.51(E).

Chapter CR 525 includes one revised instruction on illegal process-

ing of drug documents and adds one new instruction on illegal processing of drug documents R.C. 2925.23.

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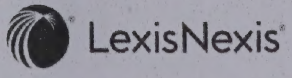

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Publication 4346, Release 22S2, September 2022

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Ohio Jury Instructions—Civil

Publication 4346 Release 22S2CIV September 2022

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- ☐ 1. Check the Publication Update and the Filing Instructions in the front of your present Volume Civil Instructions—General—Special Topics. Both should be labeled Release 22S1CIV and dated June 2022. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 22S1CIV, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.
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For faster and easier filing, all references are to right-hand pages only.

VOLUME Civil Instructions—General—Special Topics

Revision

☐	Guide-1 thru Guide-7	Guide-1 thru Guide-7
☐	Title page thru lxxiii.	Title page thru lxxiii
☐	55	55 thru 56.9
☐	83 thru 115	83 thru 115
☐	315 thru 324.1	315 thru 324.9
☐	458.3.	458.3 thru 458.5
☐	459 thru 486.1	459 thru 486.5
☐	559 thru 583	559 thru 584.1
☐	I-1 thru I-35	I-1 thru I-35

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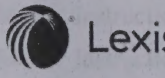

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Publication 4346, Release 22S2CIV, September 2022

USER'S GUIDE to *Ohio Jury Instructions* *[Rev. 3/12/22]*

• **What is *Ohio Jury Instructions*?** *Ohio Jury Instructions* ("*OJI*") is a collection of non-binding model instructions prepared by the Ohio Judicial Conference's Ohio Jury Instructions Committee. Although often cited with approval by courts, including the Supreme Court of Ohio, *OJI* is not considered binding. The template instructions set forth in *OJI* are primarily intended for use by judges in instructing juries in the state and federal courts of Ohio when Ohio law is involved in a case. Practitioners can utilize *OJI* to submit requested jury charges.

• **Mission Statement.** *OJI*'s mission is to provide neutral template instructions that are understandable and provide jurors with the law and procedure necessary to enable them to reach fair and just verdicts.

• **Organization.** Published in both electronic and print form, *OJI* is divided into two volumes, one for civil and one for criminal. The civil volume consists of one book, while the criminal volume consists of two books. Each volume is further divided into ***titles***, with each title indicating a broad category of related content. Each title is then separated into ***chapters*** that focus on a more narrow set of related content. Each chapter contains individually numbered ***instructions*** that set forth specific jury charges on a particular topic.

• **Examples of Titles:**

Title 3: General Civil Trial Instructions

Title 4: Civil Subject Matter Instructions: Tort-Related

Title 5: Civil Subject Matter Instructions: Contract-Related

• **Examples of Chapters within Title 4:**

Chapter CV 401 Negligence

Chapter CV 403 Comparative Negligence

[chapter designations continue until]

Chapter CV 453 Tortious Interference with Economic Relations

• **Examples of Instructions within Chapter CV 453:**

CV 453.01 Tortious interference with business relations

CV 453.03 Tortious interference with contractual relations

CV 453.05 Tortious interference with employment relations

• **Finding an instruction by topic.** Each volume of *OJI* contains a table of contents prepared by the Ohio Jury Instructions Committee and an index prepared by the print publisher. In the criminal volume, instructions are grouped by topics that generally

mirror the criminal statutory scheme set forth in the Ohio Revised Code. In the civil volume, instructions are grouped by topics into titles that are generally related by legal concepts or themes. For example, the chapters in Title 5 all deal with contract-related topics. Within titles, narrower topics generally follow broader topics in the same related area. For example, "Contracts" is the first chapter in Title 5 and is followed by such chapters as the "Uniform Commercial Code" and the "Consumer Sales Practices Act."

• **Headings.** Each numbered instruction in OJI has a descriptive title. Within that titled instruction, there are often multiple instructions, or sections, many of which include descriptive titles, as well as possible sub-sections with their own headings.

• **Example of title of civil instruction:**

CV 417.01 Standard of care: physician/surgeon

• **Example of title of civil section heading:**

CV 417.01 Standard of care: physician/surgeon, § 1. INTRODUCTION.

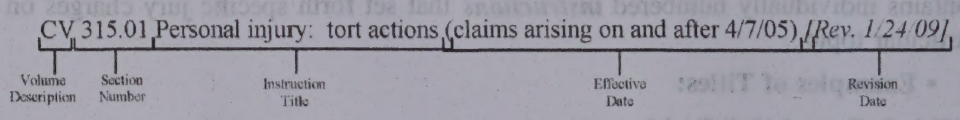
• **Example of title of criminal instruction:**

CR 521.31 Obstructing official business R.C. 2921.31

• **Example of title of criminal section heading:**

CR 521.31 Obstructing official business R.C. 2921.31, § 2. PRIVILEGE.

• **Instruction heading diagram.** The descriptive title of each instruction is comprised of several important pieces of information. A diagram of an example instruction heading and descriptions of the head pieces includes:



• **Volume description.** Two letters will indicate whether an instruction is included in the civil (CV) or criminal (CR) volume of *OJI*.

• **Section number.** The first three digits of the section number indicate the chapter in which the instruction is located. The digits following the decimal point indicate where in the chapter the instruction is located. Criminal instructions generally mirror the criminal statutory scheme set forth in the Ohio Revised Code.

• **Instruction title.** Each numbered instruction in *OJI* has a descriptive title.

• **Effective date.** Users should note that there are often multiple versions of an instruction corresponding to select dates of applicability. These multiple versions are arranged chronologically by ***effective date***. For example, amendments to or judicial interpretation of a criminal statute may necessitate different versions of an instruction explaining different elements or definitions. The ***effective date*** of an instruction is indicated in a parenthetical accompanying its title.

• When a **significant substantive change** has occurred, such as a change in the elements of a crime, there will be a separate instruction covering the time period involved, which will result in *multiple instructions* separated by their distinct effective dates.

• **Example:**

CR 503.02 Murder R.C. 2903.02 (offenses committed on and after 9/6/96 but before 6/30/98) and CR 503.02 Murder R.C. 2903.02 (offenses committed on and after 6/30/98) *[Rev. 2/24/07]*

• When a **minor change** has occurred, the change will be reflected *within* the text of *one* instruction, with a parenthetical indication of the effective date of the change.

• **Example:**

CV 451.19 Affirmative defenses, § 4. UNFORSEEABLE USE OF PRODUCT (Common law claims only arising before 4/7/05).

• **Revision date.** More recent instruction titles are followed by an italicized and bracketed indication of when the Ohio Jury Instructions Committee last drafted or revised that instruction. Users are cautioned that instructions can quickly become outdated due to changes in statutes and case law. Additional research to validate whether any given instruction is up to date is recommended.

• **Example:**

CV 453.01 Tortious interference with business relations *[Rev. 2/23/08]*

• **Use of (ADDITIONAL).** Section headings may be accompanied by the parenthetical characterization "ADDITIONAL." The use of "(ADDITIONAL)" means that the trial judge *should* read and submit the instruction to the jury only when it is applicable or required based on the specific circumstances or facts of the case involved.

• **Example:**

CV 517.07 Collateral in possession of secured party R.C. 1309.27 [UCC § 9-207] *[Rev. 2/24/07]*, § 3. FUNGIBLE (ADDITIONAL).

• **Use of (OPTIONAL).** Section headings may be accompanied by the parenthetical characterization "OPTIONAL." "OPTIONAL" instructions may be used to further define or amplify an existing instruction. The use of "(OPTIONAL)" means that the trial judge *may* read and submit the instruction to the jury when it is applicable based on the specific circumstances or facts of the case involved. Inclusion of an "OPTIONAL" instruction is at the discretion of the trial judge.

• **Example:**

CV 417.01 Standards of care: physician/surgeon *[Rev. 3/28/09]*, § 7. FREEDOM FROM NEGLIGENCE (OPTIONAL).

• **Sections within instruction.** Each instruction in OJI is usually broken into numbered sections, which can be further broken into lettered subsections. Often this will track statutory numbering and lettering. For example, subsections in a criminal instruction may include (A), (B), and (D)—skipping (C) if the statutory (C) does not constitute an offense. Definitional sections always follow the order in which the terms were first used in the body of the preceding instruction.

• **Need to fill in blanks.** Within a section of an instruction, there may be places where a blank exists. Users must fill in the blanks with the applicable information arising from the circumstances and facts of the case involved.

• **Example:**

CV 425.03 Negligence in proprietary functions, § 1(B). IDENTIFYING A PROPRIETARY FUNCTION. The decision whether a particular activity relates to a proprietary function is a matter of law for the court. I instruct you that _____ is a proprietary function (and that _____ is not a proprietary function).

• **Example of actual instruction given to jury:**

The decision whether a particular activity relates to a proprietary function is a matter of law for the court. I instruct you that selling used computers is a proprietary function and that awarding contracts for the construction of roads is not a proprietary function.

• **Parenthetical alternatives.** Within a section of an instruction, there may be two or more possible choices presented as alternative content contained within separate parentheses. Sometimes the alternatives indicate possible choices that will have to be made so that the instruction matches the circumstances and facts of the case involved. Inapplicable choices should never be presented to the jury. At other times, the alternatives will indicate possible choices between content that mean the same thing; the trial judge should select the most clear or most easily understood choice. In written instructions distributed to a jury, the trial judge should delete the use of parentheses and instead simply include only the applicable word or words selected.

• **Example:**

CV 401.07 Foreseeability *[Rev. 1/10/04]*, § 1. GENERAL. In deciding whether (reasonable) (ordinary) care was used, you will consider whether (the defendant) (either party) in question should have foreseen under the circumstances that the likely result of an act or failure to act would cause some (injury) (damage).

• **Example of actual instruction given to jury:**

In deciding whether reasonable care was used, you will consider whether the defendant in question should have foreseen under the circumstances that the likely result of an act or failure to act would cause some injury.

• **Parenthetical language.** Within a suggested instruction, there may be language contained in parentheses that is not an alternative content choice, but is instead content that the trial judge should read and submit to the jury only when it is applicable or required based on the specific circumstances or facts of the case involved. This parenthetical language serves the same function as model instructions contained in sections headings containing the use of "(ADDITIONAL)" as explained above. Because the parenthetical language is often less than a sentence, it has not received its own section heading.

• **Example:** If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of _____, your verdict must be guilty (as to one or more of the defendants, according to your findings).

• **Multiple parentheticals.** Parentheses usually indicate two or more possible choices presented as alternative content. Sometimes, however, multiple parentheticals indicate two or more units of thought that, by virtue of necessary sentence structure, fall as back-to-back parentheticals, not all of which are alternatives to one another. The last

parenthetical(s) may require another selection between distinct alternatives or, as shown below, it may require insertion of a distinct unit of thought.

- **Example:**

The defendant caused the death of (*insert name of victim*) as a proximate result of (committing) (attempting to commit) (*insert name of offense of violence*).

• **Italics.** Similar to the use of blanks, when content is placed in italics, a user must supply the specific necessary content.

- **Example:**

CV 453.07 Tortious Interference with expectancy of inheritance *[Rev. 12/5/09]*, § 1. GENERAL. The plaintiff claims that the defendant intentionally interfered with his/her/its expectancy of inheritance from (*insert name of decedent*) and that the plaintiff was damaged as a result.

• **Presentation of alternatives.** Depending upon the circumstances and facts of the case involved, there is often a need to present alternative instructions to a jury. Alternative instructions are separated by "*(or)*." When the trial judge should select only one of a number of possible alternative instructions, italicized language preceding the list of choices directs the judge to "(*Use appropriate alternative*)." When there is a possible need to read and submit more than one alternative to the jury, italicized language preceding the list of choices directs the trial judge to "(*Use appropriate alternative[s]*)."

- **Example:**

CV 433.01 Right of publicity in individual's persona R.C. Chapter 2741 (claims arising on and after 11/22/99) *[Rev. 5/8/10]*, § 4. COMMERCIAL PURPOSE. "Commercial purpose" means the use of or reference to an aspect of an individual's (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance)

(*Use appropriate alternative[s]*)

(A) on or in connection with a place, product, merchandise, goods, services, or other commercial activities;

(*or*)

(B) for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities;

(*or*)

(C) for the purpose of promoting travel to a place;

(*or*)

(D) for the purpose of fundraising.

- **Example of actual instruction given to jury:**

"Commercial purpose" means the use of or reference to an aspect of an individual's distinctive appearance for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities.

• **Comments.** No material identified as "COMMENT" text should be read or submitted to the jury. *OJI* frequently includes material that is set out under the heading of a

"COMMENT" and encapsulated in a box, italicized, or appears in smaller font and indented. This commentary generally includes references to statutory and case law authority that provide the source for the model instruction given. Other content included as commentary can include explanations by the Ohio Jury Instructions Committee for a model instruction, suggestions for the trial judge, and indications of what by consensus the Committee believes in regard to an instruction. Comments may also contain material explaining the applicability or limitations of an instruction. The research reflected in a comment should not be considered exhaustive and cannot be relied upon as the most current authority on the issue dealt with by the instruction.

• **Use of "Drawn from."** "Drawn from" is used when the text of the instruction follows the language in the cited authority but not verbatim.

• **Example:**

CV 617.03 Invitee; business visitor *[Rev. 10/9/09]*, § 4. OPEN AND OBVIOUS.

COMMENT

Drawn from *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573; *Simmers v. Bentley Contr. Co*, 64 Ohio St.3d 642, 1992-Ohio-42. The "open and obvious" doctrine remains a viable part of Ohio law. The split among the appellate courts is effectively reconciled by the "attendant circumstances" exception to the doctrine. Both instructions ("open and obvious" and "attendant circumstances") should be given whenever the trial court has decided to instruct on "open and obvious."

In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the Court held that, although the open and obvious doctrine can excuse a defendant's breach of a common-law duty of care, it does not override statutory duties because the violation of a statutory duty constitutes negligence per se. In *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, the Court held that the open and obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code because administrative rule violations do not constitute negligence per se.

• **Definitions.** When an instruction uses a term or terms that need to be defined for a jury, a subsequent numbered section or subsection in that instruction provides either the definition or a reference to elsewhere in *OJI* or in the Ohio Revised Code where the definition to be read and submitted to the jury exists.

• **Examples:**

CV 453.07 Tortious interference with expectancy of inheritance, § 6. UNDUE INFLUENCE. "Undue influence" means that which overpowers the will of a person and induces him/her into making a distribution of his/her property that he/she would not have made if left to act freely and according to his/her own plans and desires.

CV 453.07 Tortious interference with expectancy of inheritance, § 7. REASONABLY CERTAIN. OJI-CV 315.01 (offenses committed on and after 4/7/05) § 10.

• **Verdict forms.** *OJI* includes some suggested templates for verdict forms, often set forth at the end of a particular instruction.

• **Interrogatories.** *OJI* sometimes includes model interrogatories. Generally, these are provided when interrogatories are required by statute or case law. Depending upon the facts of the case and the number and identity of the parties, interrogatories may need to be modified, and judges should thoroughly examine and, if necessary, edit the interrogatories before submitting them to a jury.

• **Language and style.** When pronoun usage depends upon the gender-specific (or neutral) selection of content, *OJI* indicates the possible choices by using "he/she/it" or "his/her/its." In selecting the applicable pronoun, the trial judge may elect to modify proposed choices to use gender-neutral language as appropriate. When the appropriate form of an article depends on the selection of content, *OJI* indicates the possible options by using "a/an." The trial judge should select the applicable article and not provide the jury with both article options.

• **Other explanatory material.** Primarily intended for new judges and practitioners, *OJI* includes several sections discussing how to conduct a jury trial, including checklists and sample instructions. This material is set forth at Title 1 and Title 2 of both volumes.

• **Citation within *OJI*.** *OJI* adheres to the *Ohio Manual of Citations*. Where the *Manual* does not provide guidance on citation form, *OJI* then follows *The Bluebook: A Uniform System of Citation.*

• **Citation of *OJI*.** In the state courts of Ohio, users should follow the *Ohio Manual of Citations* when citing *OJI*.

• **Example:**

Ohio Jury Instructions, CV Section 537.17 (Rev. Dec. 10, 2011)

• **Contributing suggestions to *OJI*.** The Committee welcomes input from both bench and bar. Proposed instructions or communications raising specific concerns that are supported by existing law or its interpretation may be submitted in writing through the Ohio Judicial Conference or members of the Committee.

OHIO JURY INSTRUCTIONS

A collection of STANDARD JURY INSTRUCTIONS in civil and criminal cases prepared by the Jury Instructions Committee of the Ohio Judicial Conference.

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SPECIAL TOPICS

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OHIO JURY INSTRUCTIONS COMMITTEE of the OHIO JUDICIAL CONFERENCE

PREFACE TO OHIO JURY INSTRUCTIONS

This preface introduces a new revised edition of the Ohio Jury Instructions (OJI) reorganized into self-contained civil and criminal volumes. The former Volume 1 "General Instructions" has been eliminated. Applicable general instructions are included in the civil and criminal volumes. There is one civil volume, now organized by general subject matter areas, and one criminal volume; however, there are three binders. The criminal volume is contained in two binders with a separate tab for "Traffic" offenses.

The purpose of the reorganization is to simplify use of OJI by judges and practitioners. Users will no longer have to switch back and forth between the current Volume 1 "General Instructions" and the substantive instructions contained in the remaining volumes. Also, the numbering of all instructions has been revised and simplified. Instructions will now be identified as "CV"(Civil) and "CR"(Criminal). For example, current 4 OJI 503.01, dealing with Aggravated Murder, becomes CR 503.01. A "Correlation Table" is included in each volume containing previous and new section numbers. Both volumes have newly designed, slightly larger loose-leaf binders. The format of individual instructions has not changed.

COMMENT

These first two paragraphs summarize the current reorganization. The balance of the preface provides historical perspective.

Ohio Jury Instructions, commonly called "OJI", was originally the project of Judges Robert L. McBride and Eugene R. McNeill. Its purpose was to present, in the same place in a single set of books, the instructions prepared by judges along with specific examples of such instructions, as well as others that were given in actual cases. The project was a joint effort of the Ohio Judicial Conference and the Ohio Common Pleas Judges Association. It was believed that the Bench and the Bar of Ohio should have the benefit, as well as the economy and convenience, of having all jury instruction material in one place in a single set of books. The jury instruction committee was composed exclusively of judges. In the event that the Committee was unable to develop a "standard" instruction, instructions were provided from individual cases. In theory, this method of combined presentation permitted the Committee to take the time required to develop its "standard" material through provisional drafts and experimental use prior to publication. The consensus among OJI Committee members was that the work of an individual judge would always be helpful until such time as "standard" instructions were developed.

Then, as now, the copyright was owned by the Ohio Judicial Conference, thereby providing for the permanent supervision by the judiciary of the development and publication of the OJI jury instructions.

It was the hope of all parties involved in 1958 that the Ohio Jury Instructions (OJI) would be helpful to the Bench and to the Bar and that the usefulness of the work would improve over the years with the continued cooperation of those interested in the instructional administration of the judicial system in the State of Ohio.

PREFACE TO OHIO JURY INSTRUCTIONS

COMMENT

Drawn from "THE NEW OJI" by Robert L. McBride, Chairman, and Eugene R. McNeill, Vice Chairman.

In 1960, a "*Standard Civil Outline*—Negligence" was released. A companion criminal outline followed in 1962. The responsibility for publication of the instructions was assigned to the Ohio Judicial Conference to relieve the Ohio Common Pleas Judges Association of the printing, sale and distribution of the material.

A standard or pattern jury instruction is a brief, accurate, and complete statement in simple and understandable language covering a single situation, purpose, or point of law. Interest and comprehension by the jury are the first considerations. Technical expressions of decision, partisan language, and references to evidence are eliminated. Exceptional situations are set out separately for use when required by special facts. The Committee recognizes the necessity for direct and simple English. "A court in considering the propriety of any jury instruction must always bear in mind that the purpose of the jury instruction is to clarify the issues and the jury's position in the case. It must be remembered that juries are composed of ordinary people on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average layperson. Thus, in considering the propriety of any instruction, the meaning of the words used in the instruction must be thought of in their common meaning to the layperson and not what such words mean to the grammarian or to the trained legal mind." *Bahm v. Pittsburgh & Lake Erie RR. Co.* (1966), 6 Ohio St.2d 192.

COMMENT

Drawn from *Preface to Volume I—1968.*

Three types of instruction appeared in OJI: (1) the "standard" or "pattern" instruction, though not necessarily titled as such; (2) the "approved" instruction, which is an instruction found in a particular case, and (3) the "new" instruction, which is a pattern instruction recommended by the Committee, but which has not yet withstood the test of time. OJI no longer uses these titles.

COMMENT

Drawn from *Preface to Volume I—1983.*

In January 1987, the Ohio Jury Instructions Committee reorganized itself and adopted a plan for the revision of the civil instructions. Under the reorganization, the Committee consisted of an editorial board composed of trial and appellate judges with final approval of all material to be published in OJI, and the writing committees appointed ad hoc to draft new material and revisions. The Board also employed a law professor as an editorial consultant, whose task was to review all drafts, to evaluate their accuracy and scope, and to assure conformity with the Committee's Style Manual. The writing committees were composed of experienced and knowledgeable persons from the judicial, practicing, and academic branches of the profession, under the supervision of a member of the Editorial Board.

It was during this phase in the development of OJI that the use of Comments was broadened to advise OJI users of many matters deemed to be of major significance. During this phase, the

Committee designated as "PROVISIONAL" those instructions published to be of assistance to the Bench and Bar of Ohio, but (of necessity) without specific judicial approval. OJI no long designates instructions as "PROVISIONAL". During this general time period, a software version of OJI became available for various personal computers.

COMMENT

Drawn from *"Preface to Ohio Jury Instructions—1993."*

In the words of former Chair Robert B. Ford, "ever shorter, ever plainer, ever fairer, this is the mission of OJI." Although it is easy to state the goal, it is difficult to attain it. In Ohio, pattern jury instructions are not "pre-approved" by appellate courts. Therefore, it is sometimes difficult to use "plain English" because the Committee is required to use statutory and case law language in drafting instructions. The law is also evolving, and the ever-increasing number of statutes and cases constantly increases the volume of the Committee's work.

The Committee has divided into Civil and Criminal Subcommittees and developed an informal protocol in order to meet the need for more and more instructions. The Ohio State Bar Association and its jury instructions committee have joined with the Ohio Judicial Conference in the ongoing effort to enhance this product. The combined effort has already generated numerous quality instructions, both civil and criminal. Multiple drafting committees using the talents of both Bench and Bar are now in place to draft and modify instructions. Other such drafting committees will be formed as needed.

Enhanced technology has also found its way into OJI. Most, if not all, of the OJI Committee's members have laptop computers to aid their efforts. Use of projection and internet technology at subcommittee meetings has greatly enhanced the editing process. At present, OJI is published in print and CD versions by LexisNexis and on-line versions by LexisNexis, Westlaw, and Casemaker, thereby maximizing user access.

And so it goes . . . evolving, hopefully improving . . . .

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Legislative Sources

- Page's Ohio Revised Code Annotated
- United States Code Service
- Ohio Constitution
- Ohio Advance Legislative Service
- Full text of pending Ohio bills
- Tracking of pending Ohio bills
- Ohio legislative archive

Agency and Administrative Sources

- Ohio Administrative Code
- The Register of Ohio
- Ohio regulation tracking
- Ohio Regulation Alert
- Ohio Attorney General opinions
- Ohio Tax Commission opinions
- Ohio Board of Tax Appeals
- Ohio Civil Rights Commission
- Ohio Division of Securities
- Ohio Elections Commission Advisory Opinions
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- Ohio Public Utilities Commission
- Ohio Environmental Review Appeals Commission decisions
- Ohio Public Employees Reporter
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- Ohio Uniform Commercial Code lien filings
- Ohio federal & state tax liens
- Ohio United States District Court civil and criminal docket summaries
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Newspapers and Magazines

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- Bucyrus Telegraph Forum
- Chillicothe Gazette
- The Cincinnati Enquirer
- Cleveland Scene
- The Columbus Dispatch
- Coshocton Tribune
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- Dayton Daily News
- Lancaster Eagle Gazette
- Mansfield News Journal
- Marion Star
- Mealey's Ohio Litigation News
- Newark Advocate
- News Herald (Port Clinton, Ohio)
- The News-Messenger (Fremont, Ohio)
- The Plain Dealer
- Toledo Blade
- Zanesville Times-Recorder

Law Reviews

- Akron Law Review
- Akron Tax Journal

- Canada-United States Law Journal
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- Case Western Reserve Journal of International Law
- Case Western Reserve Law Review
- Cleveland State Law Review
- Health Matrix
- I/S: A Journal of Law and Policy for the Information Society
- Ohio Northern Law Review
- Ohio State Journal of Criminal Law
- The Ohio State Journal on Dispute Resolution
- Ohio State Law Journal
- The Toledo Journal of Great Lakes' Law, Science & Policy
- Toledo Law Review
- University of Cincinnati Law Review
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- Anderson's Ohio Primary Law on CD-ROM
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- Columbus, Ohio Code

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- Anderson's Ohio Civil Rules Practice with Forms
- Weissenberger's Ohio Civil Procedure Litigation Manual
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- Anderson's Ohio Pretrial Litigation Practice Manual
- Anderson's Sixth Circuit Practice Manual
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- Bender's Forms of Discovery
- Federal Litigation Guide
- Moore's Federal Practice
- Pozner & Dodd, Cross-Examination: Science and Techniques, Second Edition

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- Anderson's Ohio Annotated Commercial Law Handbook
- Anderson's Ohio Consumer Law Manual
- Anderson's Ohio Creditors' Rights
- Asset Based Financing
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- Commercial Damages Reporter
- Consumer Credit Law Manual
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- Jury Instructions in Commercial Litigation
- Sales & Bulk Transfers Under the UCC
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- Ohio Liquor Laws and Rules
- Sixth Circuit Criminal Handbook
- Search and Seizure
- Criminal Defense Techniques

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- Anderson's Ohio School Law Guide
- Anderson's Ohio School Law Manual
- Anderson's Ohio School Finance
- Rapp, Education Law

Environmental Law

- Anderson's OhioEPA Laws and Regulations with CD-ROM
- Environmental Law Practice Guide
- Brownfields Law and Practice
- Grad, Treatise on Environmental Law

Elder, Estate, Gift and Trust Law

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- Anderson's Ohio Probate Practice and Procedure
- Anderson's The Simple Will in Ohio
- Anderson's Ohio Elder Law Practice Manual
- Modern Estate Planning
- Tax, Estate & Financial Planning for the Elderly
- Murphy's Will Clauses: Annotations and Forms with Tax Effects

Evidence

- Weissenberger's Ohio Evidence Treatise
- Weissenberger's Ohio Evidence Courtroom Manual
- Weinstein's Federal Evidence

Family Law

- Anderson's Ohio Family Law Handbook
- Anderson's Ohio Juvenile Law Handbook
- Anderson's Ohio Family Law
- Anderson's Ohio Domestic Relations Practice Manual
- Family Law & Practice
- Lindey & Parley on Separation Agreements & Antenuptial Contracts 2d Ed.

Forms

- Anderson's Ohio Online Forms
- Anderson's Ohio Forms on CD-ROM
- Ohio Forms of Pleading and Practice
- Ohio Forms of Pleading and Practice on CD-ROM
- Ohio Transaction Guide
- Ohio Transaction Guide on CD-ROM
- Couse's Ohio Form Book
- Anderson's Legal Forms

Insurance Law

- Anderson's Ohio Insurance Law Handbook
- Appleman on Insurance
- Law of Liability Insurance
- Law of Life and Health Insurance

Jury Instructions

- Ohio Jury Instructions
- Ohio Jury Instructions on CD-ROM

Labor & Employment Law

- Anderson's Ohio Employment Law Handbook
- Employment in Ohio: A Guide to Employment Laws, Regulations and Practice

- Labor and Employment Law
- Larson on Employment Discrimination

Personal Injury

- Damages in Tort Actions
- Medical Malpractice
- Personal Injury: Actions, Defenses, Damages

Real Estate Law

- Anderson's Ohio Real Estate Law Handbook
- Anderson's Ohio Residential Real Estate Manual
- Ohio Real Property Law and Practice
- Construction Law
- Nichols on Eminent Domain
- Powell on Real Property

Securities Law

- Anderson's Ohio Securities Law Handbook
- Anderson's Ohio Securities Law and Practice
- Anderson's Ohio Investment Adviser Manual
- Blue Sky Regulation
- Federal Securities Act of 1933
- Federal Securities Exchange Act of 1934
- Investment Advisers: Law and Compliance
- Securities Law Techniques

Shepard's

- Shepard's Ohio Citations

Tax Law

- Anderson's Ohio Tax Law Handbook
- Federal Income Taxation of Corporations Filing Consolidated Returns
- Federal Tax Practice & Procedure
- How to Save Time & Taxes Preparing Fiduciary Income Tax Returns

Workers' Compensation and SSDI

- Anderson's Ohio Workers' Compensation Law Handbook
- Fulton's Ohio Workers' Compensation Law
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266.25	OJI-CV 533.23
266.27	OJI-CV 533.25
271.01	OJI-CV 453.01
271.03	OJI-CV 453.03
301.01	OJI-CV 609.01
301.03	OJI-CV 609.03
301.05	OJI-CV 609.05
301.07	OJI-CV 609.07
301.09	OJI-CV 609.09
301.11	OJI-CV 609.11
301.13	OJI-CV 609.13
301.15	OJI-CV 609.15
301.17	OJI-CV 609.17
301.19	OJI-CV 609.19
301.21	OJI-CV 609.21
301.23	OJI-CV 609.23
302.01	OJI-CV 537.01
302.03	OJI-CV 453.05
302.05 (claims arising before 4/09/03)	OJI-CV 537.05 (claims arising before 4/09/03)

Previous Instruction Number	New Edition Instruction Number
302.05 (claims arising on and after 4/7/05)	OJI-CV 537.05 (claims arising on and after 4/7/05)
302.05 (claims arising on and after 4/9/03 but before 4/7/05)	OJI-CV 537.05 (claims arising on and after 4/9/03 but before 4/7/05)
302.07	OJI-CV 537.07
302.09	OJI-CV 537.09
302.11	OJI-CV 537.11
302.13	OJI-CV 537.13
302.15	OJI-CV 537.15
302.17	OJI-CV 537.17
305.01	OJI-CV 437.01
307.01	OJI-CV 449.01
307.03	OJI-CV 449.03
307.05	OJI-CV 449.05
307.07	OJI-CV 449.07
307.09	OJI-CV 449.09
307.11	OJI-CV 449.11
307.13	OJI-CV 449.13
307.15	OJI-CV 449.15
307.17	OJI-CV 449.17
309.01	OJI-CV 441.01
309.03	OJI-CV 441.03
309.05	OJI-CV 441.05
309.07	OJI-CV 441.07
312.01	OJI-CV 425.01
312.03	OJI-CV 425.03
312.05	OJI-CV 425.05
312.07	OJI-CV 425.07
312.09	OJI-CV 425.09
312.11	OJI-CV 425.11
312.13	OJI-CV 425.13
312.15	OJI-CV 425.15
313.01	OJI-CV 637.01
313.03	OJI-CV 637.03
313.05	OJI-CV 637.05
313.07	OJI-CV 637.07
313.09	OJI-CV 637.09
313.11	OJI-CV 637.11
315.01	OJI-CV 509.01
315.02	OJI-CV 509.03
315.03	OJI-CV 509.05
315.04	OJI-CV 509.07
317.01	OJI-CV 701.01
317.03	OJI-CV 701.03

Previous Instruction Number	New Edition Instruction Number
317.05	OJI-CV 701.05
317.07	OJI-CV 701.07
317.09	OJI-CV 701.09
317.11	OJI-CV 701.11
317.13	OJI-CV 701.13
317.15	OJI-CV 701.15
319.01	OJI-CV 415.01
319.03	OJI-CV 415.03
319.05	OJI-CV 415.05
319.07	OJI-CV 415.07
319.09	OJI-CV 415.09
319.11	OJI-CV 415.11
323.01	OJI-CV 709.01
323.03	OJI-CV 709.03
323.05	OJI-CV 709.05
323.07	OJI-CV 709.07
323.09	OJI-CV 709.09
323.11	OJI-CV 709.11
323.13	OJI-CV 709.13
323.15	OJI-CV 709.15
323.17	OJI-CV 709.17
323.19	OJI-CV 709.19
323.21	OJI-CV 709.21
323.23	OJI-CV 709.23
323.25	OJI-CV 709.25
323.27	OJI-CV 709.27
323.29	OJI-CV 709.29
323.31	OJI-CV 709.31
323.33	OJI-CV 709.33
323.35	OJI-CV 709.35
323.37	OJI-CV 709.37
323.39	OJI-CV 709.39
323.41	OJI-CV 709.41
323.43	OJI-CV 709.43
323.45	OJI-CV 709.45
323.47	OJI-CV 709.47
323.49	OJI-CV 709.49
323.51	OJI-CV 709.51
323.53	OJI-CV 709.53
323.55	OJI-CV 709.55
323.57	OJI-CV 709.57
323.59	OJI-CV 709.59
323.61	OJI-CV 709.61
323.63	OJI-CV 709.63

Previous Instruction Number	New Edition Instruction Number
323.65	OJI-CV 709.65
325.01	OJI-CV 413.01
325.03	OJI-CV 413.03
325.05	OJI-CV 413.05
325.07	OJI-CV 413.07
325.09	OJI-CV 413.09
325.11	OJI-CV 413.11
327.01	OJI-CV 613.01
327.03	OJI-CV 613.03
327.05	OJI-CV 613.05
327.07	OJI-CV 613.07
327.11	OJI-CV 613.09
327.13	OJI-CV 613.11
327.15	OJI-CV 613.13
327.17	OJI-CV 613.15
327.19	OJI-CV 613.17
327.21	OJI-CV 613.19
327.23	OJI-CV 613.21
327.25	OJI-CV 613.23
327.27	OJI-CV 613.25
327.29	OJI-CV 613.27
327.31	OJI-CV 613.29
327.33	OJI-CV 613.31
327.35	OJI-CV 613.33
329.01	OJI-CV 529.01
330.01	OJI-CV 439.01
330.03	OJI-CV 439.03
330.05	OJI-CV 439.05
330.07	OJI-CV 439.07
330.09	OJI-CV 439.09
331.01	OJI-CV 417.01
331.03	OJI-CV 417.03
331.05	OJI-CV 417.05
331.07	OJI-CV 417.07
331.09	OJI-CV 417.09
331.11	OJI-CV 417.11
331.13	OJI-CV 417.13
331.15	OJI-CV 417.15
331.17	OJI-CV 417.17
331.19	OJI-CV 417.19
333.01	OJI-CV 421.01
333.03	OJI-CV 421.03
333.05	OJI-CV 421.05
333.07	REMOVED

Previous Instruction Number	New Edition Instruction Number
345.01	OJI-CV 621.01
345.03	OJI-CV 621.03
345.05	OJI-CV 621.05
345.07	OJI-CV 621.07
345.09	OJI-CV 621.09
345.11	OJI-CV 621.11
345.13	OJI-CV 621.13
348.01	OJI-CV 705.01
348.03(A)	OJI-CV 705.03
348.03(B)	OJI-CV 705.05
348.07	OJI-CV 705.07
348.09	OJI-CV 705.09
348.11	OJI-CV 705.11
348.13	OJI-CV 705.13
348.15	OJI-CV 705.15
349.01	OJI-CV 433.01
349.03	OJI-CV 433.03
349.05	OJI-CV 433.05
349.07	OJI-CV 433.07
349.09	OJI-CV 433.09
349.11	OJI-CV 433.11
349.13	OJI-CV 433.13
351.01	OJI-CV 451.01
351.03	OJI-CV 451.03
351.05	OJI-CV 451.05
351.07	OJI-CV 451.07
351.09	OJI-CV 451.09
351.11	OJI-CV 451.11
351.13	OJI-CV 451.13
351.15	OJI-CV 451.15
351.17	OJI-CV 451.17
351.19	OJI-CV 451.19
351.21	OJI-CV 451.21
351.23	OJI-CV 451.23
354.01	OJI-CV 601.01
354.03	OJI-CV 601.03
354.05	OJI-CV 601.05
354.07	OJI-CV 601.07
354.09	OJI-CV 601.09
355.01	OJI-CV 443.01
356.01	OJI-CV 445.01
356.03	OJI-CV 445.03
356.05	OJI-CV 445.05
356.07	OJI-CV 445.07

Previous Instruction Number	New Edition Instruction Number
356.09	OJI-CV 445.09
356.11	OJI-CV 445.11
356.13	OJI-CV 445.13
356.15	OJI-CV 445.15
356.17	OJI-CV 445.17
356.19	OJI-CV 445.19
356.21	OJI-CV 445.21
356.23	OJI-CV 445.23
356.25	OJI-CV 445.25
359.01	OJI-CV 513.01
359.03	OJI-CV 513.03
359.05	OJI-CV 513.05
359.07	OJI-CV 513.07
359.09	OJI-CV 513.09
362.01	OJI-CV 505.01
362.03	OJI-CV 505.03
362.05	OJI-CV 505.05
362.07	OJI-CV 505.07
362.09	OJI-CV 505.09
362.11	OJI-CV 505.11
362.13	OJI-CV 505.13
362.15	OJI-CV 505.15
362.17	OJI-CV 505.17
362.19	OJI-CV 505.19
362.21	OJI-CV 505.21
362.23	OJI-CV 505.23
362.25	OJI-CV 505.25
362.27	OJI-CV 505.27
362.29	OJI-CV 505.29
362.31	OJI-CV 505.31
362.33	OJI-CV 505.33
362.35	OJI-CV 505.35
362.37	OJI-CV 505.37
362.39	OJI-CV 505.39
362.41	OJI-CV 505.41
362.43	OJI-CV 505.43
362.45	OJI-CV 505.45
362.47	OJI-CV 505.47
362.49	OJI-CV 505.49
362.51	OJI-CV 505.51
362.53	OJI-CV 505.53
363.01	OJI-CV 633.01
363.03	OJI-CV 633.03
363.05	OJI-CV 633.05

Previous Instruction Number	New Edition Instruction Number
363.07	OJI-CV 633.07
363.09	OJI-CV 633.09
363.13	OJI-CV 633.11
365.01	OJI-CV 427.01
365.03	OJI-CV 427.03
365.05	OJI-CV 427.05
365.07	OJI-CV 427.07
365.09	OJI-CV 427.09
365.11	OJI-CV 427.11
365.13	OJI-CV 427.13
365.15	OJI-CV 427.15
365.17	OJI-CV 427.17
365.19	OJI-CV 427.19
369.01	OJI-CV 517.01
369.03	OJI-CV 517.03
369.05	OJI-CV 517.05
369.07	OJI-CV 517.07
369.09	OJI-CV 517.09
369.11	OJI-CV 517.11
369.13	OJI-CV 517.13
369.15	OJI-CV 517.15
369.17	OJI-CV 517.17

CRIMINAL INSTRUCTIONS CORRELATION TABLE

Previous Instruction Number	New Edition Instruction Number
1.01	OJI-CR 101.01
1.03	OJI-CR 101.03
1.05	OJI-CR 101.05
1.07	OJI-CR 101.07
1.09	OJI-CR 101.09
1.11	OJI-CR 101.11
1.13	OJI-CR 101.13
1.15	OJI-CR 101.15
1.17	OJI-CR 101.17
1.19	OJI-CR 101.19
1.21	OJI-CR 101.21
1.23	OJI-CR 101.23
1.25	OJI-CR 101.25
1.27	OJI-CR 101.27
1.29	OJI-CR 101.29
1.31	OJI-CR 101.31
1.33	OJI-CR 101.33
1.35	OJI-CR 101.35
1.37	OJI-CR 101.37
1.39	OJI-CR 101.39
1.41	OJI-CR 101.41
1.43	OJI-CR 101.43
1.45	OJI-CR 101.45
1.47	OJI-CR 101.47
1.49	OJI-CR 101.49
1.51	OJI-CR 101.51
1.53	OJI-CR 101.53
1.55	OJI-CR 101.55
1.57	OJI-CR 101.57
1.59	OJI-CR 101.59
1.61	OJI-CR 101.61
1.63	OJI-CR 101.63
1.65	OJI-CR 101.65
1.67	OJI-CR 101.67
1.69	OJI-CR 101.69
1.71	OJI-CR 101.71
1.73	OJI-CR 101.73
1.75	OJI-CR 101.75
1.77	OJI-CR 101.77
1.79	OJI-CR 101.79
1.81	OJI-CR 101.81
1.83	OJI-CR 101.83

Previous Instruction Number	New Edition Instruction Number
1.85	OJI-CR 101.85
1.87	OJI-CR 101.87
401.01	OJI-CR 301.01
401.02	OJI-CR 301.03
401.03	OJI-CR 301.05
401.04	OJI-CR 301.07
402.10	OJI-CR 401.01
402.11	OJI-CR 401.03
402.12	OJI-CR 401.05
402.20	OJI-CR 401.07
402.21	OJI-CR 401.09
402.25	OJI-CR 401.11
402.30	OJI-CR 401.13
402.50	OJI-CR 401.15
402.51	OJI-CR 401.17
402.52	OJI-CR 401.19
402.53	OJI-CR 401.21
402.60	OJI-CR 401.23
402.61	OJI-CR 401.25
402.99	OJI-CR 401.27
403.01	OJI-CR 405.01
403.03	OJI-CR 405.03
403.10	OJI-CR 405.05
403.50	OJI-CR 405.07
403.55	OJI-CR 405.09
405.01	OJI-CR 409.01
405.10	OJI-CR 409.03
405.20	OJI-CR 409.05
405.21	OJI-CR 409.07
405.22	OJI-CR 409.11
405.25	OJI-CR 409.13
405.40	OJI-CR 409.15
405.41	OJI-CR 409.17
405.50	OJI-CR 409.19
405.51	OJI-CR 409.21
405.52	OJI-CR 409.23
405.60	OJI-CR 409.25
405.63	OJI-CR 409.27
405.64	OJI-CR 409.29
405.65	OJI-CR 409.31
405.91	OJI-CR 409.33
407.01	OJI-CR 413.01
407.03	OJI-CR 413.03
407.05	OJI-CR 413.05

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407.10	OJI-CR 413.07
409.01	OJI-CR 417.01
409.02	OJI-CR 417.03
409.03	OJI-CR 417.05
409.05	OJI-CR 417.07
409.07	OJI-CR 417.09
409.11	OJI-CR 417.11
409.13	OJI-CR 417.13
409.15	OJI-CR 417.15
409.21	OJI-CR 417.17
409.31	OJI-CR 417.19
409.50	OJI-CR 417.21
409.55	OJI-CR 417.23
409.56	OJI-CR 417.25
409.57	OJI-CR 417.27
409.60	OJI-CR 417.29
409.65	OJI-CR 417.31
409.67	OJI-CR 417.33
411.01	OJI-CR 421.01
411.03	OJI-CR 421.03
411.05	OJI-CR 421.05
411.07	OJI-CR 421.07
411.10 (offenses committed before 10/27/00)	OJI-CR 421.09 (offenses committed before 10/27/00)
411.10 (offenses committed on and after 10/27/00)	OJI-CR 421.09 (offenses committed on and after 10/27/00)
411.11 (offenses committed before 10/27/00)	OJI-CR 421.11 (offenses committed before 10/27/00)
411.11 (offenses committed on and after 10/27/00)	OJI-CR 421.11 (offenses committed on and after 10/27/00)
411.19	OJI-CR 421.13
411.20	OJI-CR 421.15
411.25	OJI-CR 421.17
411.31	OJI-CR 421.19
411.33	OJI-CR 421.21
411.35	OJI-CR 421.23
411.51	OJI-CR 421.25
411.53	OJI-CR 421.27
411.55	OJI-CR 421.29
413.01	OJI-CR 425.01
413.05	OJI-CR 425.03
413.10	OJI-CR 425.05
413.11	OJI-CR 425.07
413.21	OJI-CR 425.09

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413.30	OJI-CR 425.13
413.35	OJI-CR 425.15
413.37	OJI-CR 425.17
413.38	OJI-CR 425.19
413.39	OJI-CR 425.21
413.40	OJI-CR 425.23
413.43	OJI-CR 425.25
413.45	OJI-CR 425.27
413.47	OJI-CR 425.29
413.49	OJI-CR 425.31
413.50	OJI-CR 425.33
413.60	OJI-CR 425.35
413.70	OJI-CR 425.37
413.80	OJI-CR 425.39
413.81	OJI-CR 425.41
413.90	OJI-CR 425.43
415.01	OJI-CR 429.01
415.03	OJI-CR 429.03
415.05	OJI-CR 429.05
415.10	OJI-CR 429.07
415.50	OJI-CR 429.09
415.75	OJI-CR 429.11
415.90	OJI-CR 429.13
503.01	OJI-CR 503.01
503.011	OJI-CR 503.011
503.02 (offenses committed on and after 9/6/96 but before 6/30/98)	OJI-CR 503.02 (offenses committed on and after 9/6/96 but before 6/30/98)
503.02 (offenses committed on and after 6/30/98)	OJI-CR 503.02 (offenses committed on and after 6/30/98)
503.03 (offenses committed on and after 9/6/96)	OJI-CR 503.03 (offenses committed on and after 9/6/96)
503.04 (offenses committed on and after 9/6/96 but before 3/23/00)	OJI-CR 503.04 (offenses committed on and after 9/6/96 but before 3/23/00)
503.04 (offenses committed on and after 3/23/00)	OJI-CR 503.04 (offenses committed on and after 3/23/00)
503.041	OJI-CR 503.041
503.05	OJI-CR 503.05
503.06 (offenses committed before 3/23/00)	OJI-CR 503.06 (offenses committed before 3/23/00)
503.06 (offenses committed on and after 3/23/00	OJI-CR 503.06 (offenses committed on and after 3/23/00)
503.07 (offenses committed on and after 9/6/96) [section repealed 3/23/00]	OJI-CR 503.07 (offenses committed on and after 9/6/96)

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503.08 (offenses committed on and after 9/6/96 but before 3/23/00)	OJI-CR 503.08 (offenses committed on and after 9/6/96 but before 3/23/00)
503.08 (offenses committed on and after 3/23/00)	OJI-CR 503.08 (offenses committed on and after 3/23/00))
503.11(A) (offenses committed on and after 9/6/96) [Rev. 2-24-07]	OJI-CR 503.11(A) (offenses committed on and after 9/6/96)
503.11(B) (offenses committed on and after 3/23/00) [Rev. 1-20-07]	OJI-CR 503.11(B) (offenses committed on and after 3/23/00)
503.12	OJI-CR 503.12
503.13	OJI-CR 503.13
503.14 (offenses committed on and after 9/6/96)	OJI-CR 503.14 (offenses committed on and after 9/6/96)
503.15 (offenses committed on and after 8/25/99)	OJI-CR 503.15 (offenses committed on and after 8/25/99)
503.16	OJI-CR 503.16
503.21 (offenses committed on and after 9/6/96)	OJI-CR 503.21 (offenses committed on and after 9/6/96)
503.22 (offenses committed on and after 9/6/96	OJI-CR 503.22 (offenses committed on and after 9/6/96
503.31	OJI-CR 503.31
503.34	OJI-CR 503.34
503.35	OJI-CR 503.35
503.211 (offenses committed before 3/10/00)	OJI-CR 503.211 (offenses committed before 3/10/00)
503.211 (offenses committed on and after 3/10/00)	OJI-CR 503.211 (offenses committed on and after 3/ 10/00 but before 1/1/08) OJI-CR 503.211 (offenses committed on and after 1/1/ 08)
503.214	OJI-CR 503.214
505.01(A) (offenses committed before 7/1/96)	OJI-CR 505.01(A) (offenses committed before 7/1/96)
505.01(A) (offenses committed on and after 7/1/96) [Rev. 1-20-07]	OJI-CR 505.01(A) (offenses committed on and after 7/1/96)
505.01(B) (offenses committed before 7/1/96)	OJI-CR 505.01(B) (offenses committed before 7/1/96)
505.01(B) (offenses committed on and after 7/1/96)	OJI-CR 505.01(B) (offenses committed on and after 7/1/96)
505.02 (offenses committed before 7/1/96)	OJI-CR 505.02 (offenses committed before 7/1/96)
505.02 (offenses committed on and after 7/1/96)	OJI-CR 505.02 (offenses committed on and after 7/1/96)
505.03	OJI-CR 505.03
505.04 (offenses committed before 7/1/96)	OJI-CR 505.04 (offenses committed before 7/1/96)
505.05 (offenses committed before 7/1/96)	OJI-CR 505.05
505.05	OJI-CR 505.05

Previous Instruction Number	New Edition Instruction Number
505.11 (offenses committed before 7/1/96)	OJI-CR 505.11 (offenses committed before 7/1/96)
505.11 (offenses committed on and after 7/1/96)	OJI-CR 505.11 (offenses committed on and after 7/1/96)
505.12	OJI-CR 505.12
505.22 (offenses committed before 7/1/96)	OJI-CR 505.22 (offenses committed before 7/1/96)
505.22 (offenses committed on and after 7/1/96)	OJI-CR 505.22 (offenses committed on and after 7/1/96)
507.02(A)(1) (offenses committed before 7/1/96)	OJI-CR 507.02(A)(1) (offenses committed before 7/1/96)
507.02(A)(1) (offenses committed on and after 7/1/96 but before 3/10/98)	OJI-CR 507.02(A)(1) (offenses committed on and after 7/1/96 but before 3/10/98)
507.02(A)(1) (offenses committed on and after 3/10/98)	OJI-CR 507.02(A)(1) (offenses committed on and after 3/10/98)
507.02(A)(2) (offenses committed before 7/1/96)	OJI-CR 507.02(A)(2) (offenses committed before 7/1/96)
507.02(A)(2) (offenses committed on and after 7/1/96)	OJI-CR 507.02(A)(2) (offenses committed on and after 7/1/96)
507.03 (offenses committed before 7/1/96)	OJI-CR 507.03 (offenses committed before 7/1/96)
507.03 (offenses committed on and after 7/1/96)	OJI-CR 507.03 (offenses committed on and after 7/1/96)
507.04 (offenses committed before 7/1/96)	OJI-CR 507.04 (offenses committed before 7/1/96)
507.04 (offenses committed on and after 7/1/96)	OJI-CR 507.04 (offenses committed on and after 7/1/96)
507.05 (offenses committed before 7/1/96)	OJI-CR 507.05 (offenses committed before 7/1/96)
507.05 (offenses committed on and after 7/1/96 but before 3/10/98)	OJI-CR 507.05 (offenses committed on and after 7/1/96 but before 3/10/98)
507.05 (offenses committed on and after 3/10/98)	OJI-CR 507.05 (offenses committed on and after 3/10/98)
507.06 (offenses committed before 7/1/96)	OJI-CR 507.06 (offenses committed before 7/1/96)
507.06 (offenses committed on and after 7/1/96)	OJI-CR 507.06 (offenses committed on and after 7/1/96)
507.07 (offenses committed before 3/22/01)	OJI-CR 507.07 (offenses committed before 3/22/01)
507.07 (offenses committed on and after 3/22/01 but before 5/7/02)	OJI-CR 507.07 (offenses committed on and after 3/22/01 but before 5/7/02)
507.07 (offenses committed on and after 5/7/02 but before 7/31/03)	OJI-CR 507.07 (offenses committed on and after 5/7/02 but before 7/31/03)
507.07 (offenses committed on and after 7/31/03)	OJI-CR 507.07 (offenses committed on and after 7/31/03)

Previous Instruction Number	New Edition Instruction Number
507.08 (offenses committed before 1/30/98)	OJI-CR 507.08 (offenses committed before 1/30/98)
507.08 (offenses committed on and after 1/30/98)	OJI-CR 507.08 (offenses committed on and after 1/30/98)
507.09 (offenses committed before 9/26/05)	OJI-CR 507.09 (offenses committed before 9/26/05)
507.09 (offenses committed on and after 9/26/05)	OJI-CR 507.09 (offenses committed on and after 9/26/05)
507.12(A)(1) (offenses committed before 9/3/96)	OJI-CR 507.12(A)(1) (offenses committed before 9/3/96)
507.12(A)(2) (offenses committed before 9/3/96)	OJI-CR 507.12(A)(2) (offenses committed before 9/3/96)
507.21 (offenses committed before 7/1/96)	OJI-CR 507.21 (offenses committed before 7/1/96)
507.21 (offenses committed on and after 7/1/96)	OJI-CR 507.21 (offenses committed on and after 7/1/96)
507.22 (offenses committed before 7/1/96)	OJI-CR 507.22 (offenses committed before 7/1/96)
507.22 (offenses committed on and after 7/1/96)	OJI-CR 507.22 (offenses committed on and after 7/1/96)
507.23	OJI-CR 507.23
507.24	OJI-CR 507.24
507.25 (offenses committed before 7/1/96)	OJI-CR 507.25 (offenses committed before 7/1/96)
507.31 (offenses committed before 7/1/96)	OJI-CR 507.31 (offenses committed before 7/1/96)
507.31 (offenses committed on and after 7/1/96 but before 1/1/04)	OJI-CR 507.31 (offenses committed on and after 7/1/96 but before 1/1/04)
507.31 (offenses committed on and after 1/1/04)	OJI-CR 507.31 (offenses committed on and after 1/1/04)
507.32	OJI-CR 507.32
507.33	OJI-CR 507.33
507.34(A) (offenses committed before 7/1/96)	OJI-CR 507.34(A) (offenses committed before 7/1/96)
507.34(A) (offenses committed on and after 7/1/96)	OJI-CR 507.34(A) (offenses committed on and after 7/1/96)
507.34(B) (offenses committed before 7/1/96)	OJI-CR 507.34(B) (offenses committed before 7/1/96)
507.34(B) (offenses committed on and after 7/1/96)	OJI-CR 507.34(B) (offenses committed on and after 7/1/96)
507.42 (offenses committed before 7/1/96)	OJI-CR 507.42 (offenses committed before 7/1/96)
507.42 (offenses committed on and after 7/1/96)	OJI-CR 507.42 (offenses committed on and after 7/1/96)
507.53(A)	OJI-CR 507.53(A)
507.53(B)	OJI-CR 507.53(B)
507.53(C)	OJI-CR 507.53(C)

Previous Instruction Number	New Edition Instruction Number
507.71 (offenses committed on and after 1/1/97)	OJI-CR 507.71 (offenses committed on and after 1/1/97)
507.72 (offenses committed on and after 1/1/97)	OJI-CR 507.72 (offenses committed on and after 1/1/97)
507.241 (offenses committed before 7/1/96)	OJI-CR 507.241 (offenses committed before 7/1/96)
507.241 (offenses committed on and after 7/1/96)	OJI-CR 507.241 (offenses committed on and after 7/1/96)
507.311	OJI-CR 507.311
507.321 (offenses committed before 7/1/96)	OJI-CR 507.321 (offenses committed before 7/1/96)
507.321 (offenses committed on and after 7/1/96)	OJI-CR 507.321 (offenses committed on and after 7/1/96)
507.322 (offenses committed before 7/1/96)	OJI-CR 507.322 (offenses committed before 7/1/96)
507.322 (offenses committed on and after 7/1/96)	OJI-CR 507.322 (offenses committed on and after 7/1/96)
507.323 (offenses committed before 7/1/96)	OJI-CR 507.323 (offenses committed before 7/1/96)
507.323 (offenses committed on and after 7/1/96)	OJI-CR 507.323 (offenses committed on and after 7/1/96)
509.02 (offenses committed before 7/1/96)	OJI-CR 509.02 (offenses committed before 7/1/96)
509.02 (offenses committed on and after 7/1/96)	OJI-CR 509.02 (offenses committed on and after 7/1/96)
509.03 (offenses committed before 7/1/96)	OJI-CR 509.03 (offenses committed before 7/1/96)
509.03 (offenses committed on and after 7/1/96)	OJI-CR 509.03 (offenses committed on and after 7/1/96)
509.04 (offenses committed before 7/1/96)	OJI-CR 509.04 (offenses committed before 7/1/96)
509.04 (offenses committed on and after 7/1/96)	OJI-CR 509.04 (offenses committed on and after 7/1/96)
509.05(A) (offenses committed before 7/1/96)	OJI-CR 509.05(A) (offenses committed before 7/1/96)
509.05(A) (offenses committed on and after 7/1/96 but before 9/30/98)	OJI-CR 509.05(A) (offenses committed on and after 7/1/96 but before 9/30/98)
509.05(A) (offenses committed on and after 9/30/98)	OJI-CR 509.05(A) (offenses committed on and after 9/30/98)
509.05(B) (offenses committed before 7/1/96)	OJI-CR 509.05(B) (offenses committed before 7/1/96)
509.05(B) (offenses committed on and after 7/1/96 but before 9/30/98)	OJI-CR 509.05(B) (offenses committed on and after 7/1/96 but before 9/30/98)
509.05(B) (offenses committed on and after 9/30/98)	OJI-CR 509.05(B) (offenses committed on and after 9/30/98)
509.05(C) (offenses committed before 7/1/96)	OJI-CR 509.05(C) (offenses committed before 7/1/96)

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509.05(C) (offenses committed on and after 7/1/96 but before 9/30/98)	OJI-CR 509.05(C) (offenses committed on and after 7/1/96 but before 9/30/98)
509.05(C) (offenses committed on and after 9/30/98)	OJI-CR 509.05(C) (offenses committed on and after 9/30/98)
509.05(D) (offenses committed before 7/1/96)	OJI-CR 509.05(D) (offenses committed before 7/1/96)
509.05(D) (offenses committed on and after 7/1/96)	OJI-CR 509.05(D) (offenses committed on and after 7/1/96)
509.06 (offenses committed before 7/1/96)	OJI-CR 509.06 (offenses committed before 7/1/96)
509.06 (offenses committed on and after 7/1/96)	OJI-CR 509.06 (offenses committed on and after 7/1/96)
509.07 (offenses committed before 7/1/96)	OJI-CR 509.07 (offenses committed before 7/1/96)
509.07 (offenses committed on and after 7/1/96)	OJI-CR 509.07 (offenses committed on and after 7/1/96)
509.08 (offenses committed before 7/1/96)	OJI-CR 509.08 (offenses committed before 7/1/96)
509.08 (offenses committed on or after 7/1/96)	OJI-CR 509.08 (offenses committed on or after 7/1/96)
509.22	OJI-CR 509.22
509.23	OJI-CR 509.23
509.24	OJI-CR 509.24
511.01(A)	OJI-CR 511.01(A)
511.01(B)	OJI-CR 511.01(B)
511.02	OJI-CR 511.02
511.11	OJI-CR 511.11
511.12	OJI-CR 511.12
511.13(A)	OJI-CR 511.13(A)
511.13(B)	OJI-CR 511.13(B)
511.21	OJI-CR 511.21
511.31	OJI-CR 511.31
511.32	OJI-CR 511.32
511.211	OJI-CR 511.211
513.02 (offenses committed before 7/1/96)	OJI-CR 513.02 (offenses committed before 7/1/96)
513.02 (offenses committed on and after 7/1/96)	OJI-CR 513.02 (offenses committed on and after 7/1/96)
513.03 (offenses committed before 7/1/96)	OJI-CR 513.03 (offenses committed before 7/1/96)
513.03 (offenses committed on and after 7/1/96)	OJI-CR 513.03 (offenses committed on and after 7/1/96)
513.04 (offenses committed before 7/1/96)	OJI-CR 513.04 (offenses committed before 7/1/96)
513.04 (offenses committed on and after 7/1/96)	OJI-CR 513.04 (offenses committed on and after 7/1/96)

Previous Instruction Number	New Edition Instruction Number
513.041 (offenses committed on and after 7/1/96)	OJI-CR 513.041 (offenses committed on and after 7/1/96)
513.11 (offenses committed before 7/1/96)	OJI-CR 513.11 (offenses committed before 7/1/96)
513.11 (offenses committed on and after 7/1/96)	OJI-CR 513.11 (offenses committed on and after 7/1/96)
513.21 (offenses committed before 7/1/96)	OJI-CR 513.21 (offenses committed before 7/1/96)
513.21 (offenses committed on and after 7/1/96)	OJI-CR 513.21 (offenses committed on and after 7/1/96)
513.31(A) (offenses committed before 7/1/96)	OJI-CR 513.31(A) (offenses committed before 7/1/96)
513.31(A) (offenses committed on and after 7/1/96)	OJI-CR 513.31(A)(offenses committed on and after 7/1/96)
513.31(B)	OJI-CR 513.31(B)
513.32 (offenses committed before 7/1/96)	OJI-CR 513.32 (offenses committed before 7/1/96)
513.32 (offenses committed on and after 7/1/96)	OJI-CR 513.32 (offenses committed on and after 7/1/96)
513.33 (offenses committed on and after 3/31/97	OJI-CR 513.33 (offenses committed on and after 3/31/97
513.34 (offenses committed on and after 3/31/97)	OJI-CR 513.34 (offenses committed on and after 3/31/97)
513.40	OJI-CR 513.40
513.41 (offenses committed before 7/1/96)	OJI-CR 513.41 (offenses committed before 7/1/96)
513.42 (offenses committed before 7/1/96)	OJI-CR 513.42 (offenses committed before 7/1/96)
513.42 (offenses committed on and after 7/1/96)	OJI-CR 513.42 (offenses committed on and after 7/1/96)
513.43 (offenses committed before 7/1/96)	OJI-CR 513.43 (offenses committed before 7/1/96)
513.43 (offenses committed on and after 7/1/96)	OJI-CR 513.43 (offenses committed on and after 7/1/96)
513.44	OJI-CR 513.44
513.45 (offenses committed before 7/1/96)	OJI-CR 513.45 (offenses committed before 7/1/96)
513.45 (offenses committed on and after 7/1/96)	OJI-CR 513.45 (offenses committed on and after 7/1/96)
513.46(A) (offenses committed before 10/29/95)	OJI-CR 513.46(A)(offenses committed before 10/29/95)
513.46(B) (offenses committed before 10/29/95)	OJI-CR 513.46(B) (offenses committed before 10/29/95)
513.46(B) (offenses committed on and after 9/26/96)	OJI-CR 513.46(B) (offenses committed on and after 9/26/96)
513.46(C) (offenses committed on and after 9/26/96)	OJI-CR 513.46(C) (offenses committed on and after 9/26/96)

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513.47 (offenses committed before 7/1/96)	OJI-CR 513.47 (offenses committed before 7/1/96)
513.47 (offenses committed on and after 7/1/96)	OJI-CR 513.47 (offenses committed on and after 7/1/96)
513.48 (offenses committed before 7/1/96)	OJI-CR 513.48 (offenses committed before 7/1/96)
513.48 (offenses committed on and after 7/1/96)	OJI-CR 513.48 (offenses committed on and after 7/1/96)
513.51 (offenses committed before 7/1/96)	OJI-CR 513.51 (offenses committed before 7/1/96)
513.51 (offenses committed on or after 7/1/96)	OJI-CR 513.51 (offenses committed on or after 7/1/96)
513.81 (offenses committed before 7/1/96)	OJI-CR 513.81 (offenses committed before 7/1/96)
513.401	OJI-CR 513.401
515.02	OJI-CR 515.02
515.03	OJI-CR 515.03
515.04	OJI-CR 515.04
515.05	OJI-CR 515.05
515.05(A) (offenses committed before 7/1/96)	OJI-CR 515.05(A) (offenses committed before 7/1/96)
515.05(B) (offenses committed on and after 7/1/96)	OJI-CR 515.05(B) (offenses committed on and after 7/1/96)
515.06 (offenses committed before 7/1/96)	OJI-CR 515.06 (offenses committed before 7/1/96)
515.07	OJI-CR 515.07
515.09	OJI-CR 515.09
515.10(A)	OJI-CR 515.10(A)
515.10(C)	OJI-CR 515.10(C)
515.11	OJI-CR 515.11
515.12 (offenses committed before 7/1/96)	OJI-CR 515.12 (offenses committed before 7/1/96)
517.01	OJI-CR 517.01
517.02(A)	OJI-CR 517.02(A)
517.02(B)	OJI-CR 517.02(B)
517.03	OJI-CR 517.03
517.11(A)	OJI-CR 517.11(A)
517.11(B)	OJI-CR 517.11(B)
517.12	OJI-CR 517.12
517.13	OJI-CR 517.13
517.21(A)	OJI-CR 517.21(A)
517.21(B)	OJI-CR 517.21(B)
517.31	OJI-CR 517.31
517.32	OJI-CR 517.32
517.40	OJI-CR 517.40

Previous Instruction Number	New Edition Instruction Number
517.41	OJI-CR 517.41
517.47	OJI-CR 517.47
519.01	OJI-CR 519.01
519.12(A)	OJI-CR 519.12(A)
519.12(B)	OJI-CR 519.12(B)
519.13(A)	OJI-CR 519.13(A)
519.13(B)	OJI-CR 519.13(B)
519.14	OJI-CR 519.14
519.21(A)	OJI-CR 519.21(A)
519.21(B)	OJI-CR 519.21(B)
519.22	OJI-CR 519.22
519.23(A)	OJI-CR 519.23(A)
519.23(B)	OJI-CR 519.23(B)
519.24	OJI-CR 519.24
519.24(A)(3) (offenses committed on and after 1/1/02)	OJI-CR 519.24(A)(3) (offenses committed on and after 1/1/02)
519.25	OJI-CR 519.25
519.27	OJI-CR 519.27
519.231	OJI-CR 519.231
521.02	OJI-CR 521.02
521.03 (offenses committed before 9/3/96)	OJI-CR 521.03 (offenses committed before 9/3/96)
521.03 (offenses committed on and after 9/3/96 and before 11/6/96)	OJI-CR 521.03 (offenses committed on and after 9/3/96 and before 11/6/96)
521.03 (offenses committed on and after 11/6/96)	OJI-CR 521.03 (offenses committed on and after 11/6/96)
521.04 (offenses committed before 9/3/96)	OJI-CR 521.04 (offenses committed before 9/3/96)
521.04 (offenses committed on and after 9/3/96)	OJI-CR 521.04 (offenses committed on and after 9/3/96)
521.05	OJI-CR 521.05
521.11	OJI-CR 521.11
521.12	OJI-CR 521.12
521.13 (offenses committed before 7/1/96)	OJI-CR 521.13 (offenses committed before 7/1/96)
521.13 (offenses committed on and after 7/1/96 and before 10/1/97)	OJI-CR 521.13 (offenses committed on and after 7/1/96 and before 10/1/97)
521.13 (offenses committed on and after 10/1/97)	OJI-CR 521.13 (offenses committed on and after 10/1/97)
521.14	OJI-CR 521.14
521.21	OJI-CR 521.21
521.22(A)	OJI-CR 521.22(A)
521.22(B)	OJI-CR 521.22(B)
521.22(C)	OJI-CR 521.22(C)

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521.22(D) (offenses committed before 3/18/97)	OJI-CR 521.22(D) (offenses committed before 3/18/97)
521.22(D) (offenses committed on and after 3/18/97)	OJI-CR 521.22(D) (offenses committed on and after 3/18/97)
521.22(E)	OJI-CR 521.22(E)
521.24	OJI-CR 521.24
521.31	OJI-CR 521.31
521.32 (offenses committed before 7/1/96)	OJI-CR 521.32 (offenses committed before 7/1/96)
521.32 (offenses committed on and after 7/1/96 and before 12/31/97)	OJI-CR 521.32 (offenses committed on and after 7/1/96 and before 12/31/97)
521.32 (offenses committed on and after 12/31/97)	OJI-CR 521.32 (offenses committed on and after 12/31/97)
521.321	OJI-CR 521.321
521.33 (offenses committed before 7/1/96)	OJI-CR 521.33 (offenses committed before 7/1/96)
521.33 (offenses committed on and after 7/1/96 but before 9/16/97)	OJI-CR 521.33 (offenses committed on and after 7/1/96 but before 9/16/97)
521.33 (offenses committed on and after 9/16/97)	OJI-CR 521.33 (offenses committed on and after 9/16/97)
521.34(A)(1)	OJI-CR 521.34(A)(1)
521.34(A)(2) (offense committed by sexually violent predator on and after 1/1/97)	OJI-CR 521.34(A)(2) (offense committed by sexually violent predator on and after 1/1/97)
521.35(A)	OJI-CR 521.35(A)
521.35(B)	OJI-CR 521.35(B)
521.36	OJI-CR 521.36
521.38	OJI-CR 521.38 (offenses committed on and after 6/11/97 but before 4/4/07) OJI-CR 521.38 (offenses committed on and after 4/4/07)
521.41	OJI-CR 521.41
521.42	OJI-CR 521.42
521.43(A)	OJI-CR 521.43(A)
521.43(B)	OJI-CR 521.43(B)
521.43(C)	OJI-CR 521.43(C)
521.44(A)	OJI-CR 521.44(A)
521.44(B)	OJI-CR 521.44(B)
521.44(C)	OJI-CR 521.44(C)
521.44(D)	OJI-CR 521.44(D)
521.44(E)	OJI-CR 521.44(E)
521.45	OJI-CR 521.45
521.51(B)	OJI-CR 521.51(B)
521.51(C)	OJI-CR 521.51(C)
521.51(D)	OJI-CR 521.51(D)
521.51(E)	OJI-CR 521.51(E)

Previous Instruction Number	New Edition Instruction Number
521.52	OJI-CR 521.52
521.331	OJI-CR 521.331
523.01 (offenses committed before 7/1/96)	OJI-CR 523.01 (offenses committed before 7/1/96)
523.01 (offenses committed on and after 7/1/96)	OJI-CR 523.01 (offenses committed on and after 7/1/96)
523.02 (offenses committed before 7/1/96)	OJI-CR 523.02 (offenses committed before 7/1/96)
523.02 (offenses committed on and after 7/1/96)	OJI-CR 523.02 (offenses committed on and after 7/1/96)
523.03 (offenses committed before 7/1/96)	OJI-CR 523.03 (offenses committed before 7/1/96)
523.03 (offenses committed on and after 7/1/96)	OJI-CR 523.03 (offenses committed on and after 7/1/96)
523.12	OJI-CR 523.12
523.13 (offenses committed before 7/1/96)	OJI-CR 523.13 (offenses committed before 7/1/96)
523.13(A) (offenses committed on and after 7/1/96)	OJI-CR 523.13(A) (offenses committed on and after 7/1/96)
523.13(B) (offenses committed on and after 7/1/96)	OJI-CR 523.13(B) (offenses committed on and after 7/1/96)
523.15	OJI-CR 523.15
523.16	OJI-CR 523.16
523.17 (offenses committed before 7/1/96)	OJI-CR 523.17 (offenses committed before 7/1/96)
523.17 (offenses committed on and after 7/1/96)	OJI-CR 523.17 (offenses committed on and after 7/1/96)
523.19	OJI-CR 523.19
523.20 (offenses committed before 7/1/96)	OJI-CR 523.20 (offenses committed before 7/1/96)
523.20 (offenses committed on and after 7/1/96)	OJI-CR 523.20 (offenses committed on and after 7/1/96)
523.21 (offenses committed before 11/9/95)	OJI-CR 523.21 (offenses committed before 11/9/95)
523.21 (offenses committed on and after 11/9/95 but before 7/1/96)	OJI-CR 523.21 (offenses committed on and after 11/9/95 but before 7/1/96)
523.21 (offenses committed on and after 7/1/96)	OJI-CR 523.21 (offenses committed on and after 7/1/96)
523.211(B)	OJI-CR 523.211(B)
523.24 (offenses committed before 7/1/96)	OJI-CR 523.24 (offenses committed before 7/1/96)
523.24 (offenses committed on and after 7/1/96)	OJI-CR 523.24 (offenses committed on and after 7/1/96)
523.32(A)(1)	OJI-CR 523.32(A)(1)
523.32(A)(2)	OJI-CR 523.32(A)(2)
523.32(A)(3)	OJI-CR 523.32(A)(3)

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523.42 (offenses committed on and after 1/1/99)	OJI-CR 523.42 (offenses committed on and after 1/1/99)
523.44	OJI-CR 523.44
523.121 (offenses committed before 7/1/96)	OJI-CR 523.121 (offenses committed before 7/1/96)
523.121 (offenses committed on and after 7/1/96)	OJI-CR 523.121 (offenses committed on and after 7/1/96)
523.122 (offenses committed before 7/1/96)	OJI-CR 523.122 (offenses committed before 7/1/96)
523.122 (offenses committed on and after 7/1/96 but before 3/18/97	OJI-CR 523.122 (offenses committed on and after 7/1/96 but before 3/18/97
523.122 (offenses committed on and after 3/18/97 but before 8/6/99)	OJI-CR 523.122 (offenses committed on and after 3/18/97 but before 8/6/99)
523.122 (offenses committed on and after 8/6/99)	OJI-CR 523.122 (offenses committed on and after 8/6/99)
523.123(A)	OJI-CR 523.123(A)
523.123(B)	OJI-CR 523.123(B)
523.131	OJI-CR 523.131
523.161 (offenses committed before 7/1/96)	OJI-CR 523.161 (offenses committed before 7/1/96)
523.161 (offenses committed on and after 7/1/96 but before 8/6/99)	OJI-CR 523.161 (offenses committed on and after 7/1/96 but before 8/6/99)
523.161 (offenses committed on and after 8/6/99)	OJI-CR 523.161 (offenses committed on and after 8/6/99)
525.02 (offenses committed before 7/1/96)	OJI-CR 525.02 (offenses committed before 7/1/96)
525.02 (offenses committed on and after 7/1/96 but before 7/22/98)	OJI-CR 525.02 (offenses committed on and after 7/1/96 but before 7/22/98)
525.02 (offenses committed on and after 7/22/98)	OJI-CR 525.02 (offenses committed on and after 7/22/98)
525.03 (offenses committed before 7/1/96)	OJI-CR 525.03 (offenses committed before 7/1/96)
525.03 (offenses committed on and after 7/1/96 but before 2/13/2001)	OJI-CR 525.03 (offenses committed on and after 7/1/96 but before 2/13/2001)
525.03 (offenses committed on and after 2/13/2001)	OJI-CR 525.03 (offenses committed on and after 2/13/2001)
525.04(offenses committed on and after 7/1/96 but before 8/7/2001)	OJI-CR 525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)
525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)	OJI-CR 525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)
525.041	OJI-CR 525.041
525.05 (offenses committed before 3/23/2000)	OJI-CR 525.05 (offenses committed before 3/23/2000)
525.05 (offenses committed on and after 3/23/2000)	OJI-CR 525.05 (offenses committed on and after 3/23/2000)
525.06	OJI-CR 525.06
525.07	OJI-CR 525.07

Previous Instruction Number	New Edition Instruction Number
525.09(A) (offenses committed before 7/22/98)	OJI-CR 525.09(A) (offenses committed before 7/22/98)
525.09(A) (offenses committed on and after 7/22/98)	OJI-CR 525.09(A) (offenses committed on and after 7/22/98)
525.09(B)	OJI-CR 525.09(B)
525.11 (offenses committed before 7/1/96)	OJI-CR 525.11(offenses committed before 7/1/96)
525.11 (offenses committed on and after 7/1/96 but before 6/20/97)	OJI-CR 525.11 (offenses committed on and after 7/1/96 but before 6/20/97)
525.11 (offenses committed on and after 6/20/97)	OJI-CR 525.11 (offenses committed on and after 6/20/97)
525.12 (offenses committed before 7/1/96)	OJI-CR 525.12 (offenses committed before 7/1/96)
525.12 (offenses committed on and after 7/1/96)	OJI-CR 525.12 (offenses committed on and after 7/1/96)
525.13 (offenses committed before 7/1/96)	OJI-CR 525.13 (offenses committed before 7/1/96)
525.13 (offenses committed on and after 7/1/96)	OJI-CR 525.13 (offenses committed on and after 7/1/96)
525.14(C) (offenses committed before 7/1/96)	OJI-CR 525.14(C) (offenses committed before 7/1/96)
525.14(C) (offenses committed on and after 7/1/96)	OJI-CR 525.14(C) (offenses committed on and after 7/1/96)
525.22(offenses committed before 7/1/96)	OJI-CR 525.22 (offenses committed before 7/1/96)
525.22(offenses committed on and after 7/1/96)	OJI-CR 525.22(offenses committed on and after 7/1/96)
525.23 (offenses committed before 7/1/96)	OJI-CR 525.23 (offenses committed before 7/1/96)
525.23(offenses committed on and after 7/1/96 but before 7/22/98)	OJI-CR 525.23(offenses committed on and after 7/1/96 but before 7/22/98)
525.23(offenses committed on and after 7/22/98)	OJI-CR 525.23(offenses committed on and after 7/22/98)
525.24	OJI-CR 525.24
525.31(offenses committed before 7/1/96)	OJI-CR 525.31(offenses committed before 7/1/96)
525.31(offenses committed on and after 7/1/96)	OJI-CR 525.31(offenses committed on and after 7/1/96)
525.32 (offenses committed before 7/1/96)	OJI-CR 525.32 (offenses committed before 7/1/96)
525.32(offenses committed on and after 7/1/96 but before 1/1/97)	OJI-CR 525.32(offenses committed on and after 7/1/96 but before 1/1/97)
525.32(offenses committed on and after 1/1/97)	OJI-CR 525.32(offenses committed on and after 1/1/97)
525.33	OJI-CR 525.33
525.36 (offenses committed before 7/1/96)	OJI-CR 525.36 (offenses committed before 7/1/96)

Previous Instruction Number	New Edition Instruction Number
525.36 (offenses committed on and after 7/1/96)	OJI-CR 525.36 (offenses committed on and after 7/1/96)
525.37(offenses committed before 7/1/96)	OJI-CR 525.37(offenses committed before 7/1/96)
525.37 (offenses committed on and after 7/1/96)	OJI-CR 525.37 (offenses committed on and after 7/1/96)
525.42	OJI-CR 525.42
527.01	OJI-CR 527.01
527.02(B)(1)	OJI-CR 527.02(B)(1)
527.02(B)(2)	OJI-CR 527.02(B)(2)
527.02(B)(3) (offenses committed on and after 3/15/01)	OJI-CR 527.02(B)(3) (offenses committed on and after 3/15/01)
527.02(C)	OJI-CR 527.02(C)
527.03	OJI-CR 527.03
527.11	OJI-CR 527.11
527.12	OJI-CR 527.12
527.13	OJI-CR 527.13
527.21	OJI-CR 527.21
527.24(B)	OJI-CR 527.24(B)
527.24(C)	OJI-CR 527.24(C)
527.27(A) (offenses committed on and after 10/09/01)	OJI-CR 527.27(A) (offenses committed on and after 10/09/01)
527.27(B) (offenses committed on and after 10/09/01)	OJI-CR 527.27(B) (offenses committed on and after 10/09/01)
533.92	OJI-CR 533.92
547.11(A)(1)(offenses committed on and after 1/1/04)	OJI-CR 547.11(A)(1)(offenses committed on and after 1/1/04)
547.11(A)(2)-(6) (offenses committed on and after 1/1/04)	OJI-CR 547.11(A)(2)-(6) (offenses committed on and after 1/1/04)
547.11(B)(offenses committed on and after 1/1/04)	OJI-CR 547.11(B)(offenses committed on and after 1/1/04)
549.01(offenses committed on and after 1/1/04)	OJI-CR 709.01(offenses committed on and after 1/1/04)
549.02	OJI-CR 749.02
549.021	OJI-CR 749.021
549.03	OJI-CR 749.03
549.62(A)	OJI-CR 749.62(A)
549.62(B)	OJI-CR 749.62(B)
549.62(C)	OJI-CR 749.62(C)
549.62(D)	OJI-CR 749.62(D)
550.02 (offenses committed before 7/1/97)	OJI-CR 550.02 (offenses committed before 7/1/97)
550.04 (offenses committed on and after 7/1/97 but before 7/13/030)	OJI-CR 550.04 (offenses committed on and after 7/1/97 but before 7/13/030)
550.04 (offenses committed on and after 7/31/03)	OJI-CR 550.04 (offenses committed on and after 7/31/03)

Previous Instruction Number	New Edition Instruction Number
550.041 (offenses committed on and after 7/31/04)	OJI-CR 550.041 (offenses committed on and after 7/31/04)
550.05 (offenses committed before 7/1/97)	OJI-CR 550.05 (offenses committed before 7/1/97)
550.05 (offenses committed on and after 7/1/97 but before 7/31/03)	OJI-CR 550.05 (offenses committed on and after 7/1/97 but before 7/31/03)
550.05 (offenses committed on and after 7/31/03 but before 4/29/05)	OJI-CR 550.05 (offenses committed on and after 7/31/03 but before 4/29/05)
550.05 (offenses committed on and after 4/2/9/05)	OJI-CR 550.05 (offenses committed on and after 4/2/9/05)
550.06 (offenses committed on and after 7/1/97 but before 7/31/03)	OJI-CR 550.06 (offenses committed on and after 7/1/97 but before 7/31/03)
550.06 (offenses committed on and after 7/31/03)	OJI-CR 550.06 (offenses committed on and after 7/31/03)
551.01	OJI-CR 551.01
551.03	OJI-CR 551.03
551.05	OJI-CR 551.05
551.07	OJI-CR 551.07
551.09	OJI-CR 551.09
551.11	OJI-CR 551.11
555.03	OJI-CR 559.03
710.11(A)(offenses committed before 1/1/04)	OJI-CR 710.11(A)(offenses committed before 1/1/04)
710.11(A) (offenses committed on and after 1/1/04)	OJI-CR 710.11(A) (offenses committed on and after 1/1/04)
710.11(B)(offenses committed before 1/1/04)	OJI-CR 710.11(B)(offenses committed before 1/1/04)
710.11(B) (offenses committed on and after 1/1/04)	OJI-CR 710.11(B) (offenses committed on and after 1/1/04)
710.12(A)(1)(a)(offenses committed before 1/1/04)	OJI-CR 710.12(A)(1)(a)(offenses committed before 1/1/04)
710.12(A)(1)(a) (offenses committed on and after 6/1/04)	OJI-CR 710.12(A)(1)(a) (offenses committed on and after 6/1/04)
710.12(A)(1)(b) (offenses committed before 1/1/04)	OJI-CR 710.12(A)(1)(b) (offenses committed before 1/1/04)
710.12(A)(1)(b) (offenses committed on and after 1/1/04)	OJI-CR 710.12(A)(1)(b) (offenses committed on and after 1/1/04)
710.12(A)(2) (offenses committed before 1/1/04)	OJI-CR 710.12(A)(2) (offenses committed before 1/1/04)
710.12(A)(2)(offenses committed on and after 1/1/04)	OJI-CR 710.12(A)(2)(offenses committed on and after 1/1/04)
710.16(offenses committed before 1/1/04)	OJI-CR 710.16(offenses committed before 1/1/04)
710.16 (offenses committed before 1/1/04)	OJI-CR 710.16 (offenses committed before 1/1/04)
710.21 (offenses committed before 1/1/04)	OJI-CR 710.21 (offenses committed before 1/1/04)

Previous Instruction Number	New Edition Instruction Number
710.21(offenses committed on and after 1/1/04)	OJI-CR 710.21(offenses committed on and after 1/1/04)
711.19 (offenses committed before 1/1/04)	OJI-CR 711.19 (offenses committed before 1/1/04)
711.19 (offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19 (offenses committed on and after 1/1/04 but before 6/1/04)
711.19(offenses committed on and after 6/1/04)	OJI-CR 711.19(offenses committed on and after 6/1/04)
711.19(A) (offenses committed before 6/30/03)	OJI-CR 711.19(A) (offenses committed before 6/30/03)
711.19(A)(offenses committed on and after 6/30/03 but before 1/1/04)	OJI-CR 711.19(A)(offenses committed on and after 6/30/03 but before 1/1/04)
711.19(A)(offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19(A)(offenses committed on and after 1/1/04 but before 6/1/04)
711.19(A)(offenses committed on and after 6/1/04)	OJI-CR 711.19(A)(offenses committed on and after 6/1/04)
711.19(A)(1)(b)-(j) (offenses committed on and after 8/17/06)	711.19(A)(1)(b)-(j) (offenses committed on and after 8/17/06)
711.19(A)(2) (offenses committed on and after 9/23/04)	OJI-CR 711.19(A)(2) (offenses committed on and after 9/23/04)
711.19(B) (offenses committed before 6/30/03)	OJI-CR 711.19(B) (offenses committed before 6/30/03)
711.19(B) (offenses committed on and after 6/30/03 but before 1/1/04)	OJI-CR 711.19(B) (offenses committed on and after 6/30/03 but before 1/1/04)
711.19(B) (offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19(B) (offenses committed on and after 1/1/04 but before 6/1/04)
711.19(B)(offenses committed on and after 6/1/04)	OJI-CR 711.19(B)(offenses committed on and after 6/1/04)
711.194	OJI-CR 711.194
711.203 (offenses committed before 1/1/04)	OJI-CR 711.203 (offenses committed before 1/1/04)
711.203 (offenses committed on and after 1/1/04)	OJI-CR 711.203 (offenses committed on and after 1/1/04)

Chapter CV 303

STANDARDS OF PROOF

CV 303.01 Revivor *[Rev. 3-19-11]*

1. GENERAL. The (plaintiff) (defendant) in this case is an (executor) (administrator). He/she represents the estate of (*insert name of decedent*). Although (*insert name of decedent*) is dead, the (*describe the claim/claims*) survive(s) and continue(s) in the name of the (executor) (administrator).

2. The fact that (*insert name of decedent*) died (after this case was filed) (from a wholly unrelated cause) does not terminate this claim. The (executor) (administrator) has been appointed to take the place of (*insert name of decedent*).

COMMENT

Use only if death resulted from an unrelated cause. Modify section 2 of this instruction if any one of the claims is for the death or permanent injury of the decedent. This type of instruction is helpful to the jury if given at the earliest opportunity.

CV 303.03 Burden of proof *[Rev. 10-22-11]*

1. BURDEN OF PROOF. The person who claims that certain facts exist must prove them by a preponderance of the evidence. This duty is known as the burden of proof.

2. BURDEN ON PLAINTIFF. The burden of proof is on the plaintiff to prove the facts necessary for his/her/its case by a preponderance of the evidence. (Later, the court will outline and explain the factual issues.)

3. WITH COUNTERCLAIM (ADDITIONAL). In this case, there is both a complaint and a counterclaim. Thus, the burden is on each party to establish the material issues necessary for his/her/its claim(s) by a preponderance of the evidence. (Later, the court will outline and explain the factual issues.)

4. AFFIRMATIVE DEFENSE (ADDITIONAL). The defendant(s) claim(s) (*describe*

affirmative defense). This is an affirmative defense. The burden of proving an affirmative defense by a preponderance of the evidence is on the defendant(s).

COMMENT

The instruction on the burden of proof for an affirmative defense is normally given with the explanation of that issue.

Judges may give a burden of proof instruction at the beginning of trial. A burden of proof instruction must always be given at the conclusion of evidence as well. Civ.R. 51.

CV 303.05 Preponderance *[Rev. 12-11-10]*

1. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. You must weigh the quality of the evidence. Quality may or may not be identical with (quantity) (the greater number of witnesses).

2. CONSIDER ALL EVIDENCE. In deciding whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.

3. EQUALLY BALANCED. If the weight of the evidence is equally balanced, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

CV 303.07 Clear and convincing *[Rev. 2/24/18]*

1. CLEAR AND CONVINCING. "Clear and convincing" means that the evidence must produce in your minds a firm belief or conviction about the (facts to be proved) (truth of the matter). It must be more than evidence that simply outweighs or overbalances the evidence opposed to it.

COMMENT

Drawn from *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176 (1987). *See also State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512.

CV 303.09 Self-defense, defense of another, defense of residence in tort actions (effective 4/6/21) *[Rev. 3/12/22]*

COMMENT

R.C. 2901.05, which places the burden on the prosecution in a criminal trial to

show beyond a reasonable doubt that an accused person did not use force in self-defense, defense of another, or defense of a person's residence, does not have any bearing on proceedings that are civil in nature. *Porter v. Porter*, 12th Dist. Butler No. CA2019-11-185, 2020-Ohio-4504.

Effective 4/6/21, the General Assembly, in R.C. 2307.601 ("Stand your ground"), abolished the duty to retreat for any person who was in a place where he/she lawfully had a right to be when he/she used force in self-defense, defense of another, or defense of his/her residence. Because the General Assembly did not explicitly state whether R.C. 2307.601 applies to claims arising before and tried after 4/6/21, the court must decide as a threshold matter whether R.C. 2307.601 applies as of the date of the trial or the date the claim arose. Because the language in R.C. 2307.601 states what a trier of fact shall not consider, the Committee believes that this statute applies to all instructions given on and after 4/6/21.

Under Ohio law, self-defense, defense of others, and defense of property are affirmative defenses. *State v. Martin*, 21 Ohio St.3d 91(1986), affirmed *Martin v. Ohio*, 480 U.S. 228 (1987).

Under Civ.R. 8(C), a defendant is required to affirmatively set forth matters that will effectively preclude a finding of liability on the part of the defendant. Failure to raise such defenses in a responsive pleading or motion will constitute a waiver of those defenses. Although not specifically listed as an affirmative defense under Civ.R. 8(C), all types of immunity have been considered affirmative defenses. *See Mitchel v. Borton*, 70 Ohio App.3d 141 (6th Dist.1990); *Murgu v. Lakewood City Sch. Dist., Bd. of Educ.*, 8th Dist. Cuyahoga No. 105699, 2018-Ohio-4643.

In *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), the court held that "a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense." *Id.* at 124. Indeed, self-defense is a "justification defense." When relevant, it functions as an excuse for an otherwise wrongful act, not as a denial or contradiction of the evidence establishing that the act was committed. *State v. Poole*, 33 Ohio St.2d 18 (1973). The Committee believes that the same analysis applies to relieve a defendant of liability for defense of others and defense of a person's residence. All of these affirmative defenses are included in R.C. 2307.601.

There is no reason to limit self-defense, defense of another, or defense of a person's residence to one particular type of case or another so long as the defendant's actions can fairly be said to have been committed in self-defense, defense of another, or defense of a person's residence. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486, 2009-Ohio-3626. For example, self-defense is available to a police officer in defending a civil suit for wrongful death. *See Fields v. Dailey*, 68 Ohio App. 3d 33 (1990), citing *Stevens v. Atzberger*, 18 Ohio Law Abs. 133 (1934). Self-defense is available to a security guard in a wrongful death action. *Ashford v. Betleyoun*, 9th Dist., Summit No. 22930, 2006-Ohio-2554. Self-defense is also available for a defendant in an intentional-tort action. *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997). Self-defense is available in a personal-injury action against a political subdivision under R.C. Chapter 2744. *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App. 3d 83 (10th Dist.1990). Self-defense is an affirmative defense to civil assault or civil battery. *See, e.g., Skinner v. Brooks*, 74 Ohio App. 288 (1st Dist. 1944); *Simpson v. Hernandez*, 6th Dist., Lucas No. CVE 83-15175

(Apr. 12, 1985); *State v. Poole*, 33 Ohio St.2d 18 (1973); *Snowden v. Hastings Mut. Ins. Co.*, 177 Ohio App.3d 209, 2008-Ohio-1540 (7th Dist.); *Huskins v. Huskins*, 7th Dist. Columbiana No. 10 CO 22, 2011-Ohio-1008.

The issue of whether an affirmative defense applies to a particular tort claim is to be determined on a case-by-case basis by examining whether the evidence supports the defense. *Niskanen, supra.*

1. GENERAL. OJI-CV 303.03 § 4.

2. SELF-DEFENSE (ADDITIONAL). In order to find that the defendant acted in self-defense, he/she must prove by the greater weight of the evidence that

(A) he/she was not at fault in creating the situation giving rise to (*describe the event in which the use of force occurred*); and

(B) he/she had reasonable grounds to believe and an honest belief, even if mistaken, that he/she was in (imminent) (immediate) danger of bodily harm and that his/her only means of escape from such danger was in the use of such force; and

(C) he/she did not violate any duty to retreat or avoid the danger.

COMMENT

Drawn from *Niskanen v. Giant Eagle, Inc.*, 22 Ohio St.3d 486, 2009-Ohio-3626. *See also State v. Williford*, 49 Ohio St.3d 247 (1990); *State v. Jackson*, 22 Ohio St.3d 281 (1986); *State v. Robbins*, 58 Ohio St.2d 74 (1979), citing *State v. Melchior*, 56 Ohio St.2d 15 (1978); *State v. Gray*, 2d Dist. Montgomery No. 26473, 2016-Ohio-5869.

The elements of self-defense are cumulative, and if the defendant fails to prove any one of the elements by a preponderance of the evidence, he/she fails to demonstrate that he/she acted in self-defense. *State v. Jackson*, 22 Ohio St.3d 281(1986).

If self-defense is an issue, the defendant may not introduce evidence of prior instances of a victim's conduct to prove that the victim was the initial aggressor. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68; *see also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426. The Committee believes that evidence of prior instances of a victim's conduct is admissible for other purposes, such as the defendant's reasonable belief in acting in self-defense. For example, see "Battered Person" at OJI-CR 417.41. *See* generally Evid.R. 404(B) and OJI-CV 309.05.

3. DEFENSE OF ANOTHER (ADDITIONAL). In order to find that the defendant acted in defense of another, he/she must prove by the greater weight of the evidence that

(A) (*insert name of person defended*) was not at fault in creating the (*describe the event in which force was used*); and

(B) he/she had reasonable grounds to believe and an honest belief, even if mistaken,

that (*insert name of person defended*) was in (imminent) (immediate) danger of bodily harm and that (*insert name of person defended*)'s only means of escape was the use of force; and

(C) (*insert name of person defended*) did not violate any duty to retreat or avoid the danger.

COMMENT

Drawn from *State v. Williford*, 49 Ohio St.3d 247 (1990); *State v. Wenger*, 58 Ohio St.2d 336 (1979); *State v. Marsh*, 71 Ohio App.3d 64 (11th Dist.1990); *State v. Chandler*, 8th Dist. Cuyahoga No. 105246, 2017-Ohio-8573, quoting *State v. Osborne*, 9th Dist. Summit No. 27563, 2016-Ohio-282.

The elements of defense of another are cumulative, and if the defendant fails to prove any one of the elements by a preponderance of the evidence, he/she fails to demonstrate that he/she acted in defense of another. *State v. Wilson*, 2nd Dist. Montgomery No. 22581, 2009-Ohio-525.

A defendant may be entitled to a defense-of-another instruction even if the person being defended is unaware of the danger or necessity for using force. The right to defend another does not depend upon a family relationship, *State v. Wenger*, 58 Ohio St.2d 336 (1979), and a family relationship between the defendant and the person defended (such as son and father) does not give the defendant any greater right to use force. *Sharp v. State*, 19 Ohio 379 (1850).

4. DEFENSE OF RESIDENCE OR VEHICLE (ADDITIONAL).

(A) PRESUMPTION—DESCRIBED. The defendant is presumed to have acted in (self-defense) (defense of another) when using defensive force if the person against whom the defensive force was used (was in the process of entering) (had entered), unlawfully and without privilege to do so, the (residence) (vehicle) occupied by the defendant.

COMMENT

Drawn from R.C. 2901.05(B)(2).

(B) PRESUMPTION—REBUTTABLE. The plaintiff claims that this presumption does not apply. This presumption does not apply if the plaintiff proves by the greater weight of the evidence that

(*Use appropriate alternative[s]*)

COMMENT

R.C. 2901.05(B)(3) advances the following two sets of circumstances in which

the R.C. 2901.05(B)(2) presumption does not apply.

Appellate courts have held that these are not the exclusive means by which the presumption may be rebutted and that the presumption can also be rebutted by proving the absence of any of the elements of self-defense, including that the defendant was at fault in creating the violent situation, did not have a reasonable belief that he or she was in imminent danger of death or great bodily harm, or violated a duty to retreat. *See State v. Kean*, 10th Dist. Franklin No. 17AP-427, 2019-Ohio-1171; *State v. Carosiello*, 7th Dist. Columbiana No. 15CO17, 2017-Ohio-8160; *State v. Montgomery*, 12th Dist. Clermont No. 2015-03-028, 2015-Ohio-4652; *State v. Hadley*, 3rd Dist. Marion No. 9-11-30, 2013-Ohio-1942; *State v. Petrone*, 5th Dist. Stark No. 2011CA67, 2012-Ohio-911; *State v. Bundy*, 4th Dist. Pike No. 1CA818, 2012-Ohio-3934.

(1) the person against whom the defensive force was used (was a lawful resident of) (had a right to be in) the (residence) (vehicle);

COMMENT

Drawn from R.C. 2901.05(B)(3)(a) and (B)(4).

(*or*)

(2) the defendant used the defensive force while in a (residence) (vehicle) and he/she was unlawfully, and without privilege to be, in that (residence) (vehicle).

COMMENT

Drawn from R.C. 2901.05(B)(3)(b) and (B)(4).

Self-defense may still apply without the statutory presumption that the person against whom the force was used was lawfully in the residence. *State v. Lewis*, 8th Dist. Cuyahoga No. 97211, 2012-Ohio-3684.

(C) PRIVILEGE (ADDITIONAL). "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

COMMENT

R.C. 2901.01.

(D) RESIDENCE. "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

COMMENT

R.C. 2901.05(D)(3).

(E) DWELLING. "Dwelling" means a (building) (*specify conveyance of any kind*) that has a roof over it and that is designed to be occupied by people lodging in the (building) (*specify conveyance*) at night, regardless of whether the (building) (*specify conveyance*) is temporary or permanent or is mobile or immobile. (A [building] [*specify conveyance*] includes, but is not limited to, an attached porch, and a [building] [*specify conveyance*] with a roof over it includes, but is not limited to, a tent.)

COMMENT

Drawn from R.C. 2901.05(D)(2).

(F) VEHICLE. "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

COMMENT

R.C. 2901.05(D)(4).

5. GREATER WEIGHT OF THE EVIDENCE. OJI-CV 303.05.

6. AT FAULT.

(*Use appropriate alternative[s]*)

(A) SELF DEFENSE (ADDITIONAL). The defendant did not act in self-defense if he/she was at fault in creating the (situation) (incident) (argument) that resulted in the use of force. The defendant was at fault when he/she was the initial aggressor and

(*Use appropriate alternative[s]*)

(1) plaintiff did not escalate the (situation) (incident) (argument) to the use of force;

COMMENT

Drawn from *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Galluzzo*, 2d. Dist. Champaign No. 99CA25 (Mar. 30, 2001).

(*or*)

(2) provoked plaintiff into using force;

COMMENT

Drawn from *State v. Gillespie*, 172 Ohio App. 3d 304, 2007-Ohio-3439 (2nd Dist.).

(*or*)

(3) did not withdraw from the (situation) (incident) (argument);

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St. 2d 15 (1978).

(*or*)

(4) withdrew from the (situation) (incident) (argument) but did not (inform) (reasonably indicate by words or acts to) the plaintiff of his/her withdrawal.

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St. 2d 15 (1978).

Self-defense is not precluded because the defendant was engaged in criminal activity when he/she was attacked. *State v. Stevenson*, 10th Dist. Franklin No. 17AP-512, 2018-Ohio-5140; *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346 (2nd Dist.).

(*or*)

(B) DEFENSE OF ANOTHER (ADDITIONAL). The defendant stands in the shoes of the person he/she defended. If (*insert name of the person defended*) was the one at fault, the defendant was not justified in his/her use of force. (*Insert name of the person defended*) was at fault when he/she was the initial aggressor and

COMMENT

State v. Wilson, 2d Dist. Montgomery No. 22581, 2009-Ohio-525.

(*Use appropriate alternative[s]*)

(1) plaintiff did not escalate the (situation) (incident) (argument) to the use of force;

COMMENT

Drawn from *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Galluzzo*, 2d. Dist. Champaign No. 99CA25 (Mar. 30, 2001).

(*or*)

(2) (*insert name of the person defended*) provoked the plaintiff into using force;

COMMENT

Drawn from *State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439 (2nd Dist.).

(*or*)

(3) (*insert name of the person defended*) did not withdraw from the (situation) (incident) (argument);

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St.2d 15 (1978).

(*or*)

(4) (*insert name of the person defended*) withdrew from the (situation) (incident) (argument) but did not (inform) (reasonably indicate by words or acts to) the plaintiff of his/her withdrawal.

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St.2d 15 (1978).

Defense of another is not precluded because the defendant was engaged in criminal activity when the person defended was attacked. Drawn from *State v. Stevenson*, 10th Dist. Franklin No. 17AP-512, 2018-Ohio-5140; *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346 (2d Dist.).

7. TEST FOR REASONABLENESS. In deciding whether the defendant had reasonable grounds to believe and an honest belief that (he/she) (*insert name of person defended*) was in (imminent) (immediate) danger of bodily harm, you must put yourself in the position of the defendant, with his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of the plaintiff and decide whether his/her acts

and words caused the defendant to reasonably and honestly believe that (defendant) (*insert name of person defended*) was about to receive bodily harm.

COMMENT

Drawn from *State v. Koss*, 49 Ohio St.3d 213 (1990).

Generally, one has a right to defend oneself by force, if that force is not excessive. *Close v. Cooper*, 34 Ohio St. 98 (1877). The force used to defend must be necessary and reasonable under the facts and circumstances of the case and in view of the danger apprehended. This is an objective test. *Pletcher v. Younker*, 44 Ohio App. 80 (9th Dist. 1932).

8. WORDS (ADDITIONAL). Words alone do not justify the use of force. Resort to force is not justified by abusive language, verbal threats, or other words, no matter how provocative.

COMMENT

State v. Shane, 63 Ohio St.3d 630 (1992); *State v. Howard*, 10th Dist. Franklin No. 16AP-226, 2017-Ohio-8742.

9. EXCESSIVE FORCE (ADDITIONAL). A person is allowed to use force that is reasonably necessary under the circumstances to protect (himself/herself) (another) from an apparent danger. If the defendant used more force than reasonably necessary and the force used was greatly disproportionate to the apparent danger, the defendant did not act in (self-defense) (defense of another) (defense of his/her [residence] [vehicle]).

COMMENT

State v. Roddy, 10th Dist. Franklin No. 81AP-499 (Nov. 17, 1981); *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Dull*, 3d Dist. Seneca No. 13-12-33, 2013-Ohio-1395; *State v. Gray*, 2d Dist. Montgomery No. 26473, 2016-Ohio-5869.

10. GREATLY DISPROPORTIONATE (ADDITIONAL). In deciding whether the force used was greatly disproportionate to the apparent danger, you may consider whether the force used shows (revenge) (a criminal purpose).

COMMENT

State v. Hendrickson, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Waller*, 4th Dist. Scioto Nos. 15CA3683 and 15CA3684, 2016-Ohio-3077.

This instruction regarding "greatly disproportionate" should be given only if the instruction on excessive force is given to the jury.

11. RESIDENCE. R.C. 2901.05, R.C. 2307.601.

12. NO DUTY TO RETREAT. For purposes of determining the potential liability of the defendant related to his/her use of force alleged to be in (self-defense) (defense of another) (defense of his/her residence), the defendant had no duty to retreat before using force in (self-defense) (defense of another) (defense of his/her residence) if the defendant was in a place in which he/she lawfully had a right to be.

You shall not consider the possibility of retreat as a factor in determining whether or not the defendant who used force in (self-defense) (defense of another) (defense of his/her residence) reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

COMMENT

R.C. 2307.601; R.C. 2901.09.

There is no duty to retreat from an assault in one's home. *State v. Williford*, 49 Ohio St.3d 247 (1990), paragraph two of the syllabus. Likewise, a person assaulted while in his place of business has no duty to retreat. *Graham v. State*, 98 Ohio St. 77 (1918). However, these exceptions to the duty to retreat have been limited to those circumstances where the assault occurs in one's home or in one's business. *State v. Jackson*, 22 Ohio St.3d 281 (1986). Merely because an assault occurs in a place where one has a right to be, whether as an invitee or licensee, does not obviate the duty to retreat. *Id.*

When effecting a lawful arrest, a police officer is under no obligation to retreat. *See State v. Yingling*, 36 Ohio Law Abs. 436 (9th Dist. 1942); *Skinner v. Brooks*, 74 Ohio App. 288 (1st Dist. 1944). Rather, the officer is required to make arrests. *See* R.C. 737.11 and 2935.03. *See also* R.C. 2917.05.

13. CONCLUSION. OJI-CV 313.05.

(Text continued on page 57)

Chapter CV 315

DAMAGES

CV 315.01 Personal injury: tort actions (claims arising before 4/9/03) *[Rev. 8/6/14]*

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (damage) proximately caused by the negligence of the defendant.

2. CONSIDERATION. In deciding this amount, you will consider the nature and extent of the injury; the effect upon physical health; the pain and suffering experienced; the ability or inability to perform usual activities; and (the earnings that were lost) (the reasonable cost of necessary medical and hospital expenses incurred). From these you will determine what sum will compensate the plaintiff for the injury to date.

3. REASONABLE VALUE (ADDITIONAL). In determining the reasonable value of medical, hospital or other related care, treatment, services, products or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to determine the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

4. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims that the (injury is permanent) (plaintiff will incur future expense) (plaintiff will experience pain or disability in the future). As to such claim(s), no damage may be found except that which is reasonably certain to exist as a proximate result of the (injury) (collision).

5. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

6. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS: PERMANENT DISABILITY.

COMMENT

In *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 608 (1992), the Court stated that the following instructions shall be given to the jury, "[i]n the appropriate case, where there have been allegations of an evidence adduced on the plaintiff's inability to perform usual activities, occasioned by the injuries received." The required instructions limit the appropriate case to one in which "the plaintiff has suffered a permanent disability."

"If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages."

"Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other element of damages."

7. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining (permanent) (future) damage, you may consider only those things that you find from the evidence are reasonably certain to continue.

COMMENT

Aggravation; acceleration, OJI-CV 315.15. Consortium, OJI-CV 315.03. Earnings, OJI-CV 315.17. Miscarriage; stillbirth, OJI-CV 315.07. Injury and expenses—joint trial of separate claims, OJI-CV 315.31.

8. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

CV 315.01 Personal injury: tort actions (claims arising on and after 4/9/03 but before 4/7/05) *[Rev. 5/3/14]*

COMMENT

Pursuant to S.B. 120, effective for claims that arise on and after 4/9/03, a "tort action" is defined as "a civil action for damages for injury, death, or loss to person or property" and includes a "product liability claim but does not include a civil

action for damages for a breach of contract or another agreement between persons." R.C. 2307.011(K). Definitions relative to damages in a tort action that apply under S.B. 120 are superseded by enactment of S.B. 80, effective for claims that arise on and after 4/7/05. See OJI-CV 315.01 (on and after 4/07/05).

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (loss) proximately and directly caused by the *(describe applicable tortious conduct)* of the defendant.

2. COMPENSATION. In deciding this amount, you will consider the plaintiff's "economic loss" and "noneconomic loss," if any, proximately and directly caused by the plaintiff's actual (injury) (loss).

3. ECONOMIC LOSS. "Economic loss" means any of the following types of financial harm:

(A) all wages, salaries, or other compensation lost as a result of the plaintiff's (injury) (loss);

(B) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff's (injury) (loss);

(C) all expenditures incurred by the plaintiff or of another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed; and

(D) any other expenditure incurred as a result of the plaintiff's (injury) (loss).

COMMENT

Drawn from R.C. 2307.011(C) as enacted by S.B. 120, effective 4/9/03.

4. REASONABLE VALUE (ADDITIONAL). In determining the reasonable value of medical, hospital or other related care, treatment, services, products or accommodations you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to determine the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

5. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must

resolve all issues presented to you only on the evidence admitted and the law in these instructions.

6. NONECONOMIC LOSS. "Noneconomic loss" means harm other than economic loss that results from the plaintiff's (injury) (loss), including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss.

COMMENT

Drawn from R.C. 2307.011(F) as enacted by S.B. 120, effective 4/9/03.

7. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims (that the injury is permanent) (that the plaintiff will incur future expense) (that the plaintiff will experience pain or disability in the future). As to such claim(s), no damage may be found except that which is reasonably certain to exist as a proximate result of the (injury) (collision).

8. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS—PERMANENT DISABILITY.

COMMENT

In *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601 (1992), the Court stated that the following instructions shall be given to the jury, "[i]n the appropriate case, where there have been allegations of an evidence adduced on the plaintiff's inability to perform usual activities, occasioned by the injuries received." The required instructions limit the appropriate case to one in which "the plaintiff has suffered a permanent disability."

"If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages."

"Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other

element of damages."

9. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

10. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

11. COMPARATIVE NEGLIGENCE INTERROGATORIES. OJI-CV 403.01 (on and after 4/9/03) OJI-CV 403.03 (on and after 4/9/03).

12. COMPARATIVE FAULT INTERROGATORIES. OJI-CV 403.05 (on and after 4/9/03), OJI-CV 403.07 (on and after 4/9/03).

13. GENERAL VERDICT.

CV 315.01 Personal injury: tort actions (claims arising on and after 4/7/05) *[Rev. 2/26/22]*

COMMENT

A tort action means a civil action for damages for injury or loss to person or property. A tort action includes a products liability claim as defined in R.C. 2307.71 or an asbestos claim as defined in R.C. 2307.91. A tort action does not include a medical claim, dental claim, optometric claim, or chiropractic claim, or a civil action for damages for a breach of contract or another agreement between persons. Drawn from R.C. 2315.18(A).

Effective 1/12/21, tort action also includes a civil action based on an unlawful discriminatory practice in employment brought under R.C. 4112.052 and a civil action brought under R.C. 4112.14.

R.C. 2315 does not apply to tort actions brought against the state in the court of claims, tort actions brought against political subdivisions of this state that are commenced under Chapter 2744 of the Revised Code, and wrongful death actions brought pursuant to Chapter 2125 of the Revised Code. Drawn from R.C. 2315.18(H).

R.C. 4513.263, effective 04/07/05, authorizes the trier of fact to diminish the recovery of compensatory damages that represent noneconomic loss as defined in R.C. 2307.011. In a tort action, such noneconomic damages that could have been recovered but for the plaintiff's failure to wear all of the available elements of a properly adjusted occupant restraining device may not be recoverable. In a jury

case, the trial judge should give cautionary instructions at the time such evidence is admitted indicating that the evidence may not be considered in the determination of negligence or contributory negligence. The judge should give a modified compensatory damages instruction that the jury may diminish the recovery of noneconomic damages that would not have occurred if a restraining device had been in use.

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (loss) that was (proximately) (directly) caused by the *(describe applicable tortious conduct)* of the defendant.

2. COMPENSATION. In deciding this amount, you will consider the plaintiff's "economic loss" and "noneconomic loss," if any, (proximately) (directly) caused by the plaintiff's actual (injury) (loss).

3. ECONOMIC LOSS. "Economic loss" means any of the following types of financial harm:

(A) all wages, salaries, or other compensation lost as a result of the plaintiff's (injury) (loss);

(B) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff's (injury) (loss);

(C) all expenditures incurred by the plaintiff or by another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed; and

(D) any other expenditure incurred as a result of the plaintiff's (injury) (loss) other than attorney's fees incurred by the plaintiff.

COMMENT

Drawn from R.C. 2315.18(A)(2).

4. REASONABLE VALUE (ADDITIONAL). In deciding the reasonable value of medical, hospital, or other related care, treatment, services, products, or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to decide the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

In *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, the Supreme Court of Ohio held that the enactment of R.C. 2315.20, effective 4/7/05, did not affect its

prior ruling in *Robinson*.

5. INCOME TAXES. An award for (*describe type of damages*), if any, (is) (is not) subject to taxation under federal or state income tax laws. In no event may you add to or subtract from an award because of such taxes.

COMMENT

Some parts of an award to a claimant may be subject to federal and/or state income taxes. R.C. 2315.01(B) provides "[i]n all tort actions, the court shall instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is/is not subject to taxation under federal or state income tax laws." The Committee believes that the trial judge should include instructions to comply with the statute when income tax issues are relevant to an award.

Maus v. New York, Chicago & St. Louis Rd. Co., 165 Ohio St. 281 (1956), held that it was not error to reject a special instruction that required consideration of income taxes because such instruction encouraged the jury to "disregard the charge on the measure of damage." Although *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), holds, as a matter of federal law, that the jury should be instructed in Federal Employer's Liability Act (FELA) cases to consider the effect of taxes in awarding damages, *Kaiser v. Ohio Bell Telephone Company*, 8th Dist. Cuyahoga No. 43056 (Aug. 27, 1981), recognizes *Liepelt* as limited to FELA cases.

6. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

7. NONECONOMIC LOSS. "Noneconomic loss" means harm other than economic loss that results from the plaintiff's (injury) (loss), including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss.

COMMENT

Drawn from R.C. 2315.18(A)(4). This statute abrogates the use of the permanent damages instruction found in *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601 (1992).

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, the Supreme Court of Ohio upheld the constitutionality of "caps" on noneconomic

damages as provided in R.C. 2315.18(B)(2).

8. FUTURE INJURY AND LOSS (ADDITIONAL). The plaintiff claims that the (injury) (loss) will continue into the future. As to such claim, no compensation or damages may be found except that which is reasonably certain to exist as a (proximate) (direct) result of the (injury) (loss). In deciding the amount of future (injury) (loss) you should follow the definitions of economic loss and non-economic loss that I have previously given to you.

9. PERMANENT INJURY OR LOSS (ADDITIONAL). The plaintiff claims that the (injury) (loss) is permanent. As to such claim, no compensation or damages may be found except that which is a (proximate) (direct) result of the (injury) (loss). In deciding the amount of damages, if any, you should follow the definitions of economic loss and non-economic loss that I have previously given to you. If you find that the (injury) (loss) is permanent, you must further decide whether the (injury) (loss) involved

(*Use appropriate alternative*)

(A) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(*or*)

(B) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.

COMMENT

R.C. 2315.18(B) places a limit on damages for noneconomic loss that is recoverable in a tort action. The amount shall not exceed $250,000 or an amount that is equal to three times the economic loss not to exceed $350,000 for each plaintiff or $500,000 for each occurrence. If the jury finds either of the findings regarding permanent injury in (A) or (B) above, then there are no limits regarding noneconomic compensatory damages.

It is the responsibility of the trier of fact to determine the total amount of the damages and for the court to enter judgment consistent with the limitations of R.C. 2315.18(B). Drawn from R.C. 2315.18(E).

10. CONSIDERATIONS IN DECIDING "NONECONOMIC LOSS." In deciding an award for "noneconomic loss," you shall not consider any of the following:

(A) evidence of the defendant's alleged wrongdoing, misconduct, or guilt; and

(B) evidence of the defendant's wealth or financial resources; and

(C) all other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

COMMENT

Drawn from R.C. 2315.18(C).

11. CONSIDERATION OF THE PLAINTIFF'S BENEFITS. During the trial of this case, the defendant introduced evidence of amounts payable as a benefit to the plaintiff for the damages that result from the plaintiff's claim for (injury) (loss). In response, the plaintiff introduced evidence of amounts that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits addressed by the defendant's offering of evidence. You may consider this evidence in arriving at a just verdict.

COMMENT

Evidence of collateral benefits is admissible on the defendant's initiative in "any tort action," which, with regard to this statute, the benefit applies to "claims for damages due to injury, death, or loss to person or property," including product liability claims and asbestos claims, and not including medical, dental, optometric, or chiropractic claims and not including claims for breach of contract or agreement. Such evidence of collateral benefits is inadmissible "if the source of the collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action." R.C. 2315.20(A).

12. SPECULATION. You are not to speculate regarding the amount, if any, of (permanent) (future) damages. You may consider only those damages that you find from the evidence are reasonably certain to (continue) (occur).

13. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely than not to (continue) (occur).

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

14. VERDICT. If you find by the greater weight of the evidence that the plaintiff is entitled to recover, you will sign the general verdict form in favor of the plaintiff, and you will continue your deliberations and answer written questions called interrogatories about the plaintiff's damages.

15. NUMBER OF JURORS TO REACH DECISIONS. It is necessary that at least (six) (three-fourths) of the jurors agree on the answers to the interrogatories and on the

general verdict. Those of you who agree will sign in ink the answers to the interrogatories and the general verdict.

16. INTERROGATORIES.

(A) The total compensatory damages recoverable by the plaintiff.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____
_____ _____
_____ _____
_____ _____

(B) The portion of total compensatory damages that represents damages for economic loss.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____
_____ _____
_____ _____
_____ _____

(C) The portion of total compensatory damages that represents damages for noneconomic loss.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____
_____ _____
_____ _____
_____ _____

(D) Do you find that the plaintiff sustained

(1) (permanent and substantial physical deformity) (loss of use of a limb) (loss of a bodily organ system)?

Yes _____ No _____
CHECK YOUR ANSWER IN INK.

_____ _____
_____ _____
_____ _____
_____ _____

(2) permanent physical functional injury that permanently prevents the plaintiff from being able to independently care for himself/herself and perform life-sustaining activities?

Yes _____ No _____
CHECK YOUR ANSWER IN INK.

_____ _____
_____ _____
_____ _____
_____ _____

17. GENERAL VERDICT. OJI-CV 403.01 § 4.

CV 315.03 Consortium *[Rev. 12-10-11]*

1. SPOUSE. If you find for (*insert name of plaintiff husband/wife*), you may award an amount that will reasonably compensate (*insert name of plaintiff husband/wife*) for damages that you find (resulted) (will result) from a loss of consortium.

COMMENT

Husband and wife have equal rights to consortium. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St.2d 65 (1970).

2. PARENT-CHILD; CHILD-PARENT. If you find for (*insert name of plaintiff parent/child*), you may award an amount that will reasonably compensate (*insert name of plaintiff parent/child*) for damages that you find (resulted) (will result) from a loss of (the child's) (parental) consortium.

COMMENT

A parent may recover for loss of a minor child's (filial) consortium. *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 1993-Ohio-205. Children, whether adults or minors, may recover for loss of parental consortium. *Rolf v. Tri State Motor Transit Co.*, 91 Ohio St.3d 380, 2001-Ohio-44.

3. CONSORTIUM. Consortium includes services, society, companionship, comfort, (sexual relations), love, and solace.

COMMENT

Drawn from *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84 (1992).

CV 315.05 Mathematical formula *[Rev. 12-11-10]*

1. FORMULA AS ARGUMENT. You cannot consider as evidence the suggestion of counsel that you use a unit value or mathematical formula to compensate for pain and suffering or disability. There is no recognized unit value for pain and suffering or

disability. Deciding compensation for pain and suffering or disability is solely your responsibility.

COMMENT

It is permissible for counsel in the opening portion of final argument to suggest a monetary amount and to apply the "mathematical formula" to illustrate the basis for the amount sought for pain and suffering, if the court instructs the jury that such argument and the amount assumed as the unit value are not evidence.

It is improper for counsel for the plaintiff to make such suggestion for the first time in the rebuttal portion of final argument. If first attempted in closing argument, counsel for the defendant must be granted time to "counter-argue." *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96. The Supreme Court did not explain why failure to discuss the subject in the opening portion of final argument constituted impropriety, and it did not suggest what other arguments might be similarly presented.

CV 315.07 Miscarriage; stillbirth *[Rev. 12-10-11]*

1. GENERAL. A woman who suffers a (miscarriage) (stillbirth) because of injuries negligently inflicted by another is entitled to recover damages that will reasonably compensate her for the physical and mental pain and suffering (and any permanent impairment of her health) resulting from the (miscarriage) (stillbirth) proximately caused by the negligence.

2. GRIEF. You cannot consider additional factors in your computation of damages. You cannot consider such items as grief for the loss of the child, including the loss of the society and enjoyment the child might have provided. (These damages should only be considered under the plaintiff's claim for wrongful death.)

COMMENT

Stidam v. Ashmore, 109 Ohio App. 431 (12th Dist. 1959), recognizes a cause of action for the wrongful death of a viable, unborn child. *See also* OJI-CV 315.47, OJI-CV 315.49.

The language included in parentheticals should only be given to the jury when there is a concurrent claim for wrongful death of the viable fetus.

CV 315.09 Future damages; periodic payments in non-comparative negligence tort actions; one defendant (claims arising on and after 1/5/88) *[Rev. 2/27/21]*

COMMENT

A jury may be required to answer interrogatories in trials of certain tort actions

as defined in R.C. 2323.56(A)(6) and (H) based on claims arising and conduct occurring on and after January 5, 1988, and commenced on and after that date. R.C. 2323.56. If the plaintiff makes a good faith claim for future damages in excess of $200,000, the court must, on the motion of the plaintiff or the defendant in question, instruct the jury to return a general verdict, and if that verdict is for the plaintiff, to answer specific interrogatories. R.C. 2323.56 does not apply to (1) actions for other than injury to person, (2) tort actions against political subdivisions pursuant to R.C. Chapter 2744, (3) claims against the state in the Court of Claims, or (4) medical and allied claims as defined in R.C. 2305.113(E)(3), formerly R.C. 2305.11(D) (governed by R.C. 2323.55, formerly R.C. 2323.57).

For interrogatories on future damages in cases involving comparative negligence or cases involving more than one defendant, see OJI-CV 403.05 and OJI-CV 403.07.

The following instructions assume that the jury will have a form of general verdict separate from the interrogatories.

1. GENERAL. If you decide by the greater weight of the evidence that the plaintiff is entitled to recover, you will answer written questions called interrogatories about damages.

COMMENT

OJI-CV 321.01.

2. NUMBER OF JURORS TO REACH DECISIONS. It is necessary that at least (six) (three-fourths) of the same jurors agree on the answers to the questions and on the general verdict. Those of you who agree will sign in ink the answers to the questions and the general verdict.

3. INTERROGATORIES.

(A) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES, PAST AND FUTURE, SUFFERED BY THE PLAINTIFF.

STATE YOUR ANSWER IN INK $_____

Move to Interrogatory (B).

(B) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (A) IS PAST DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $_____

Move to Interrogatory (C).

(C) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (A) IS FUTURE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $_____

If you find that there are future damages, move to Interrogatory (D). If you find that there are no future damages, do not answer the remaining Interrogatories, complete the verdict form for the plaintiff, and report to the court that you have finished your deliberations.

(D) WHAT ARE THE PORTIONS OF THE FUTURE DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (C) THAT FALL INTO THE FOLLOWING:

(1) FUTURE ECONOMIC LOSS ..... $_____

(2) FUTURE NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (C).

Move to Interrogatory (E).

(E) WHAT ARE THE PORTIONS, IF ANY, OF FUTURE ECONOMIC LOSS SHOWN IN YOUR ANSWER TO INTERROGATORY (D)(1), IF ANY, THAT FALL INTO THE FOLLOWING:

(1) WAGES, SALARIES OR OTHER LOST COMPENSATION (EARNING CAPACITY) (FRINGE BENEFITS) ..... $_____

(2) (EXPENDITURES) (EXPENSES) (COSTS) FOR MEDICAL CARE OR TREATMENT, REHABILITATION SERVICES, OR OTHER CARE, TREATMENT, SERVICES, PRODUCTS, OR ACCOMMODATIONS ..... $_____

(3) ANY OTHER (EXPENDITURES) (EXPENSES) (COSTS) ..... $_____

The total of future economic loss must equal your answer to Interrogatory (D)(1).

TOTAL ..... $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Drawn from R.C. 2323.56(B)(1).

4. PAST AND FUTURE DAMAGES. Damages that (result from) (are caused by) injury to the person are divided into past and future damages. "Past damages" are those that have accrued up to the time you reach your verdict. "Future damages" are those that are reasonably certain to occur after you reach your verdict.

COMMENT

Drawn from R.C. 2323.56(A)(2).

5. ECONOMIC LOSS. R.C. 2323.56(A)(1).

6. NONECONOMIC LOSS. R.C. 2323.56(A)(4).

7. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.

8. GENERAL VERDICT. OJI-CV 403.01 § 4 (claims arising before 1/5/88).

CV 315.11 Future damages; periodic payments in comparative negligence tort actions; two defendants, interrogatories on comparative negligence required (claims arising on and after 1/5/88) ***[Rev. 5-6-06]***

COMMENT

The instructions at OJI-CV 403.05 will serve in cases with two defendants, provided the terms referring to the defendant are pluralized. For an example of the changes needed, compare OJI-CV 403.03 with OJI-CV 403.01. Note the long and short forms of Interrogatories, with and without vicarious liability of two defendants, at OJI-CV 403.03 §§ 3, 4, 5, and 6.

CV 315.13 Tort actions based on claims for future damages; cost of annuity ***[Rev. 5-6-06]***

One method of determining the present value of future damages is the cost of an annuity. You have heard evidence about the cost of an annuity in connection with the

award of future damages, if any. You may consider that evidence in making your decisions about the amount of future damages and give it such weight as you think proper.

COMMENT

R.C. 2317.62. See R.C. 2317.62(A)(3) for the definition of "tort action." The admission of annuity evidence must be consistent with the Rules of Evidence. An analogous provision applicable to wrongful death actions is found in R.C. 2125.02(A)(3)(b)(ii).

CV 315.15 Aggravation; acceleration *[Rev. 12-10-11]*

1. GENERAL. If you find for the plaintiff, you cannot consider any amount for a (pre-existing condition) (prior injury), nor for pain or expenses resulting solely from such (pre-existing condition) (prior injury). However, you will consider and decide an amount for whatever (aggravation) (acceleration) of injury, pain, or expenses you find were proximately caused by this (defendant) (collision). It is the extent of the (aggravation) (acceleration) for which the defendant is responsible.

COMMENT

If there is medical testimony that aggravation exists, the issue must be submitted to the jury even if the doctor testifies that it was impossible to state the amount or degree of aggravation. *Kantor v. McKinley*, 9 Ohio App.2d 243 (1966).

For submission of aggravation in a workers' compensation case, see OJI-CV 427.13, OJI-CV 427.15.

2. AGGRAVATION. "Aggravation" means that a physical condition, already existing, was made worse by this (defendant) (collision).

3. ACCELERATION. "Acceleration" means causing a condition to reach a point that it would have normally reached, but at a measurably earlier time. Where a defendant is not responsible for the pre-existing condition but only for the acceleration of that condition, the defendant is only liable for the damages proximately caused by the acceleration.

CV 315.17 Earnings *[Rev. 12-10-11]*

1. PAST. You will consider whatever loss of earnings the evidence shows that the plaintiff sustained as a proximate result of the injury. (You will not award as damages for loss of earnings an amount more than *[insert dollar amount]*.)

2. FUTURE. You will also consider whatever loss (if any) of earnings the plaintiff will, with reasonable certainty, sustain in the future as a proximate cause of the injury. The measure of such damage is what the evidence shows with reasonable certainty to be the difference between the amount he was capable of earning before he was injured

and the amount he is capable of earning in the future in his injured condition.

3. SPECULATION. OJI-CV 315.01 § 5.

CV 315.19 Automobile; personal property *[Rev. 12-10-11]*

1. MEASURE OF DAMAGE. If you find for the plaintiff, you will determine an amount of money that will reasonably compensate the plaintiff for the (damage to) (loss of) the (vehicle) (property). The measure of damage which you apply is the difference in the fair market value of the (vehicle) (property) immediately before, and immediately after, the collision.

2. REPAIRS. You may consider the reasonable cost of necessary repairs as evidence of the reduction in fair market value. The measure of damage, however, is the difference in the fair market value of the (vehicle) (property) immediately before and after the accident.

COMMENT

Falter v. Toledo, 169 Ohio St. 238 (1959).

Wooster Feed Mfg. Co. v. Village of Tallmadge, 82 Ohio App. 499 (1948):

> Proof of reasonable cost of repairs alone makes a prima facie case and is sufficient to carry the case to a jury on a question of damages.
>
> In the absence of other evidence, reasonably tending to prove that the vehicle had a greater market value after the repairs than before the accident, or that the cost of repairs exceeded the value of the vehicle as it was before the injury, evidence of the reasonable cost of repairs is sufficient to sustain a judgment in amount equal to such reasonable cost.

(Case involved the lack of any evidence whatsoever of before and after fair market value.)

3. FAIR MARKET VALUE. The fair market value is the price the (vehicle) (property) would bring if offered for sale in the open market by an owner who desired to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so—each having knowledge of the pertinent facts concerning such (vehicle) (property).

COMMENT

Bishop v. East Ohio Gas Co., 143 Ohio St. 541 (1944).

4. PERSONAL PROPERTY WITHOUT MARKET VALUE. OJI-CV 315.23.

COMMENT

It is sometimes useful to require the value of property damage to be set out separately in the verdict or to submit a special finding in those cases where other parties have some interest in the special element of damage. OJI-CV 315.25. This avoids problems under certain insurance policies and assists in the distribution of the proceeds.

CV 315.21 Loss of use *[Rev. 12-10-11]*

1. GENERAL. Plaintiff claims that he/she suffered further damage in the sum of (*insert amount*) by reason of being deprived of the use of the (automobile) (property) for a period of (*insert number of days*) days.

2. NO RENTAL. If you find for the plaintiff, you will consider as an element of damage the reasonable value of the use of the (automobile) (property) during the period reasonably necessary for making repairs or restoring it to a usable condition.

COMMENT

Insley v. Mitchell, 118 Ohio App. 104 (1963).

3. RENTAL. If you find for the plaintiff, you will consider as an element of damage the reasonable cost of the rental of a substitute (automobile) (property) during the period reasonably necessary to repair the damage.

CV 315.23 Personal property without market value *[Rev. 12-10-11]*

1. GENERAL. If you find for the plaintiff, the measure of damage is the reasonable value of the property to the owner.

2. TOTAL DESTRUCTION. If property for personal use is destroyed, the measure of damage is the reasonable value to the owner. This does not necessarily mean the market value, because property of a strictly personal nature may have a nominal market value if sold as used property, but would have a higher reasonable value to the owner. In arriving at an amount, you may consider the original cost; the cost to replace such property less reasonable depreciation for its condition and use; the uses which the plaintiff has for the property; and other facts in the evidence. But the test you will apply is the reasonable value of the article to the owner at the time.

COMMENT

Erie Rd. Co. v. Steinberg, 94 Ohio St. 189 (1916); *Layton v. Ferguson Moving and Storage Co.*, 109 Ohio App. 541 (1959); *Bishop v. East Ohio Gas Co.*, 143 Ohio

St. 541 (1944).

3. NOT TOTALLY DESTROYED. If an article is not totally destroyed, the measure of damage is the cost of repair to restore it to the condition it was in before it was damaged, provided the repairs do not exceed the reasonable value of the article to the owner. If repairs to the article will not restore its value, or if the cost of repairs exceeds its reasonable value to the owner, the measure of damage is the difference in reasonable value of the article to the owner immediately before and immediately after it was damaged.

4. PERSONAL PROPERTY WITH MARKET VALUE. OJI-CV 315.19.

CV 315.25 Subrogation *[Rev. 1-21-12]*

COMMENT

The Committee has eliminated the pattern instruction on subrogation. Where a subrogation issue exists, the trial judge will have to prepare a charge that addresses the particular subrogation issue.

CV 315.27 Recovery limited, no joinder – husband, wife *[Rev. 1-21-12]*

1. MARRIED PERSON OR CHILD – EXPENSES EXCLUDED. In this case you cannot consider any amount for hospital, medical, or other expenses for the care and treatment of the injury. These items are the legal responsibility of the (husband) (wife) (father) (mother) of the plaintiff.

2. MARRIED PERSON – EXPENSES INCLUDED. A (husband) (wife) is responsible for providing necessary care for his/her spouse and may recover for the cost of such expenses in an action on his/her own behalf. If the (husband) (wife) proves by the greater weight of the evidence that he/she specifically contracted in his/her own name and became personally liable for such (hospital) (medical) expenses, however, he/she may recover the cost of the expenses.

COMMENT

Drawn from R.C. 3103.03.

3. MEDICAL EXPENSES ONLY. You cannot consider any amount of damage for the injury itself or for the pain and suffering experienced by the (husband) (wife) (child). These items are not involved in this case, which is an action by the (husband) (wife) (father) (mother) to recover for the medical, hospital, and other expenses that are his/her legal responsibility.

CV 315.31 Injury and expenses – joint trial of separate claims *[Rev. 1-21-12]*

1. MULTIPLE PLAINTIFFS. If you find for the plaintiffs, you will separately decide

by the greater weight of the evidence an amount of money that will reasonably compensate each plaintiff for the actual (injury) (loss) proximately caused by the negligence of the defendant(s). As to each plaintiff, you will consider the nature and extent of the injury; the effect upon his/her physical health; the pain that he/she experienced; his/her ability or inability to perform usual activities; and (the earnings that he/she lost) (the reasonable cost of necessary medical and hospital expenses he/she incurred). From these you will decide what sum will compensate that plaintiff for the injury to date.

2. PERMANENT. OJI-CV 315.01.

3. MEDICAL EXPENSES. As to (*insert name of [spouse] [parent] [guardian]*), in deciding an amount, you will take into consideration the reasonable cost of all necessary medical (and hospital) expenses incurred by him/her to date for the care and treatment of his/her (spouse) (child) (ward).

CV 315.33 Multiple defendants *[Rev. 1-21-12]*

1. ONE RECOVERY. A party may bring an action and obtain a judgment against more than one defendant for his/her damage. Irrespective of the number of defendants, the plaintiff may only receive full compensation once for the same injury.

2. CONCURRENT NEGLIGENCE. OJI-CV 401.39.

CV 315.35 Real estate *[Rev. 3-28-09]*

1. If you find for the plaintiff, you will determine from a preponderance of the evidence the amount of money that will reasonably compensate the plaintiff for the actual damage to the property.

2. PERMANENT. When real property has been permanently or irreparably damaged, the measure of damage is the difference in the fair market value of the whole property, including improvements thereon, immediately before and immediately after the damage occurred.

3. FAIR MARKET VALUE. The fair market value of real property is the price it would bring if offered for sale in the open market by an owner who desired to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so—both parties being aware of the pertinent facts concerning the property.

4. TEMPORARY. If the damage to the property is temporary and such that the property can be restored to its original condition, then the owner may recover the reasonable cost of these necessary repairs. (Evidence of the diminution of the fair market value of the property caused by the damage may be considered in deciding the reasonableness of the cost of repairs.) (If, however, the property is commercial and these repair costs exceed the difference in the fair market value of the property immediately before and after the damage, then this difference in value is all that the owner may recover.)

COMMENT

Martin v. Design Const., 2009-Ohio-1; *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238.

CV 315.37 Punitive damages: certain tort actions (claims arising on and after 4/7/05) *[Rev. 9/12/20]*

COMMENT

Under R.C. 2315.21(B), effective 4/7/05, in a state-law tort action where the plaintiff seeks both compensatory and punitive damages, on the motion of any party, the court shall bifurcate the trial into two stages. If the jury finds that the plaintiff is entitled to an award of compensatory damages, the trial will enter the second stage. In the second stage, the jury will consider evidence that relates to the plaintiff's claim for punitive damages and determine whether the plaintiff is entitled to an award of punitive damages and the amount of those damages.

If the jury returns a verdict that awards punitive damages to the plaintiff, the court shall enter judgment on the punitive damages verdict based on the restrictions and limitations imposed by R.C. 2315.21(D). Pursuant to R.C. 2315.21(F), the trial court, trial counsel, and witnesses are prohibited from disclosing the statutory limitations on punitive damages to the jury.

Note that R.C. 2315.21(D)(6) removes the caps if the defendant is found to be acting with one or more of the culpable mental states of purposely and knowingly as described in R.C. 2901.22 and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action. If this section is applicable, the court will have to draft additional interrogatories for the jury to answer.

See R.C. 2307.80 for punitive damages in product liability claims.

The supreme courts of the United States and Ohio addressed the constitutionality of punitive damages in *Gore v. BMW of North America, Inc.*, 517 U.S. 559 (1996); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113; and *Barnes v. University Hospitals of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344. The Supreme Court of Ohio in *Barnes* held that a court reviewing an award of punitive damages must independently analyze three factors to determine whether the award is constitutional: (1) the degree of reprehensibility of the party's conduct; (2) the ratio of punitive damages to the actual harm inflicted; and (3) the difference between the award and civil sanctions authorized for similar misconduct. The factors controlling an award of punitive damages apply to post-verdict review by trial and appellate courts and should not be included in jury instructions.

1. GENERAL. Because you found that the plaintiff is entitled to compensatory damages against the defendant, you must now consider whether you will separately award punitive damages.

COMMENT

If the issue of punitive damages is not bifurcated, the instruction must be tailored accordingly. The Supreme Court of Ohio has held that R.C. 2315.21(B) creates a substantive right to bifurcation that supersedes Civ.R. 42(B). *Havel v. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552.

2. MALICE; FRAUD; OR PRINCIPAL'S AUTHORIZATION, PARTICIPATION, OR RATIFICATION. Punitive damages may be awarded against the defendant as a punishment and to discourage others from committing similar wrongful acts. You are not required to award punitive damages to the plaintiff, and you may not do so unless you find that the plaintiff has met his/her/its burden to prove by clear and convincing evidence that the

(Use appropriate alternative[s])

(A) defendant's actions demonstrated actual malice;

(*or*)

(B) defendant's actions demonstrated aggravated or egregious fraud;

(*or*)

(C) defendant, as principal or master, knowingly (authorized) (participated in) (ratified) the actions or omissions of an agent or servant that demonstrated (actual malice) ([aggravated] [egregious] fraud).

COMMENT

Drawn from 2315.21(C); *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178 (1975).

3. ACTUAL MALICE. "Actual malice" necessary for an award of punitive damages is

(Use appropriate alternative[s])

(A) a state of mind characterized by hatred, ill will, or a spirit of revenge;

(*or*)

(B) a conscious disregard for the rights and safety of another person that has a great probability of causing substantial harm.

COMMENT

Drawn from *Preston v. Murty*, 32 Ohio St.3d 334 (1987); *Moskovitz, Exr. v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994).

The statute uses the term "malice," while the Supreme Court of Ohio cases recite a standard for "actual malice." The Committee believes it is better to use the case law term and its common-law definition where there is no evidence that the General Assembly intended a different meaning.

4. SUBSTANTIAL. "Substantial" means major or significant and not trifling or small.

5. AGGRAVATED OR EGREGIOUS FRAUD. Fraud is "aggravated" if it is accompanied by the existence of malice or ill will. Fraud is "egregious" if the fraudulent wrongdoing is particularly gross or malicious.

COMMENT

Drawn from *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.*, 12 Ohio St.3d 241 (1984); *Logsdon v. Graham Ford Co.*, 54 Ohio St.2d 336 (1978).

6. DAMAGES TO NON-PARTIES (ADDITIONAL). Evidence was introduced that (*insert name[s] of defendant[s]*) conduct has resulted in harm to persons other than (*insert name[s] of plaintiff[s]*). You should consider this evidence only for the purpose of helping you decide whether (*insert name[s] of defendant[s]*) showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish (*insert name[s] of defendant[s]*) for the direct harm his/her/its alleged misconduct caused to other persons.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

7. DEFENDANT'S OUT-OF-STATE CONDUCT (ADDITIONAL). Evidence was introduced of (*insert name[s] of defendant[s]*) conduct in (another state) (other states). You should consider this evidence only for the purpose of helping you decide whether (*insert name[s] of defendant[s]*) showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish (*insert name[s] of defendant[s]*) for the direct harm his/her/its alleged misconduct caused to other persons.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

8. PRINCIPAL AND AGENT. OJI-CV Chapter 423.

9. EMPLOYER AND EMPLOYEE. OJI-CV Chapter 537.

10. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07; R.C. 2315.21(D)(4).

11. AMOUNT OF PUNITIVE DAMAGES. If you award punitive damages, it should be presumed that the plaintiff has been made whole for his/her/its injuries by the award of compensatory damages. In determining the amount of punitive damages, you may consider all of the following:

(A) the harm caused was physical as opposed to economic;

(B) the tortious conduct evinced an indifference or a reckless disregard of the health or safety of others;

(C) the target of the conduct had financial vulnerability;

(D) the conduct involved repeated actions or was an isolated incident; and

(E) the harm was a result of intentional malice, trickery or deceit, or mere accident. The amount you award should be fair and reasonable and should not be influenced by passion or prejudice.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003).

12. ATTORNEY FEES. If you decide that the defendant is liable for punitive damages, you must also decide whether the defendant is liable for the reasonable attorney fees of counsel employed by the plaintiff in the prosecution of this action.

(Use appropriate alternative)

(A) JUDGE DETERMINES FEES. If you decide that the defendant is liable for attorney fees, the court will determine the amount;

(or)

(B) JURY DETERMINES FEES. OJI-CV 315.39.

13. VERDICT FORMS.

(A) PUNITIVE DAMAGES. We, the jury, find that the plaintiff _____ is _____ is not entitled to an award of punitive damages. Punitive Damage Amount $ _____

_____ _____
_____ _____
_____ _____
_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

(B) ATTORNEY FEES We, the jury, find attorney fees _____ should _____ should not be awarded against the defendant.

_____ _____
_____ _____
_____ _____
_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

(C) ATTORNEY FEES ATTORNEY FEES (OPTIONAL) We, the jury, find attorney fees _____ should _____ should not be awarded against the defendant. Amount of Attorney Fees $ _____

_____ _____
_____ _____
_____ _____
_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

CV 315.39 Reasonable attorney fees *[Rev. 9/12/20]*

COMMENT

Under the "American rule," each party is responsible for its own attorney fees, unless an exception applies. One exception to the American rule affords the trial court the discretion to order the losing party to pay the reasonable attorney fees of the prevailing party as an element of compensatory damages when the jury finds that punitive damages are warranted. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056. Other exceptions to the American rule include when the right to recover attorney fees is set forth in a statute or in a valid fee-shifting provision in a contract.

A litigant does not have a constitutional right to a trial by jury as to the determination of whether, or in what amount, attorney fees should be awarded in a tort action. When the jury awards punitive damages and determines that attorney fees should be awarded, the amount of those fees shall be determined by the trial judge who may, in his or her discretion, submit the question of the amount of fees

to the jury. *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St.3d 657 (1992), paragraphs two and three of the syllabus, overruled on other grounds by *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461. *See also* R.C. 2315.21(D); R.C. 2315.18.

1. GENERAL. (*Insert name of prevailing party*) is seeking an award of reasonable attorney fees to be paid by (*insert name of applicable party*). (*Insert name of prevailing party*) has the burden of proving by the greater weight of the evidence the reasonable amount of attorney fees to be awarded.

2. INITIAL CALCULATION OF ATTORNEY FEES. In deciding the reasonable amount of attorney fees to award (*insert name of prevailing party*), you must multiply what you decide is the reasonable hourly rate of (*insert name of prevailing party*)'s attorney(s) by what you decide is the reasonable number of hours worked representing (*insert name of prevailing party*) in this case.

COMMENT

Drawn from *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056.

Calculating attorney fees by multiplying the reasonable hourly rate by the number of hours worked is known as the lodestar method. *Id.*

3. REASONABLENESS. In determining the reasonableness of the hourly rate and the hours worked, you may consider any of the following factors:

(A) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(B) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee customarily charged in the locality for similar legal services;

(D) the amount involved and the results obtained;

(E) the time limitations imposed by the client or by the circumstances;

(F) the nature and length of the professional relationship with the client;

(G) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(H) the structure of the fee, meaning whether the fee is fixed, hourly, or contingent.

COMMENT

Drawn from *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056; Prof.Cond.R. 1.5.

4. REASONABLE HOURLY RATE. A reasonable hourly rate is the prevailing market rate in the relevant community for the services rendered by the attorney(s) given the complexity of the issues and the experience of the attorney(s) involved.

COMMENT

Drawn from *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056, citing *Blum v. Stenson*, 465 U.S. 886 (1984) and *State ex. rel. Harris v. Rubino*, 156 Ohio St.3d 296, 2018-Ohio-5109.

5. PREVAILING MARKET RATE. The prevailing market rate can often be calculated based on a firm's normal billing rate because, in most cases, billing rates reflect market rates.

COMMENT

Drawn from *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056, citing *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 414 (3d Cir.1993).

6. RELEVANT COMMUNITY.

COMMENT

Ohio has not adopted a definition of "relevant community." Federal law indicates that the relevant community is the legal community within the court's territorial jurisdiction. *See, e.g., Adock-Ladd v. Secy. of Treasury*, 227 F.3d 343 (6th Cir.2000).

7. REASONABLE NUMBER OF HOURS WORKED. In deciding the reasonable number of hours worked, you should exclude hours that are excessive, redundant, or otherwise unnecessary.

COMMENT

Drawn from *State ex. rel. Harris v. Rubino*, 156 Ohio St.3d 296, 2018-Ohio-5109.

8. ENHANCEMENT (ADDITIONAL). (*Insert name of prevailing party*) is seeking ~~reasonable attorney fees above the calculation of the reasonable hourly rate multiplied~~ by the reasonable number of hours worked. To obtain an enhancement, (*insert name of prevailing party*) must prove by the greater weight of the evidence that an upward adjustment is appropriate based on a factor not already included in the initial

calculation. For example, an enhancement might be appropriate when the method used in deciding the hourly rate employed in the initial calculation does not adequately measure the true market value of the attorney's services, as demonstrated in part during the litigation. If you decide to enhance the fee obtained through your initial calculation, you must provide your rationale justifying the modification by answering the (interrogatory) (interrogatories) provided.

COMMENT

Drawn from *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056, citing *Perdue v. Kenny A.*, 559 U.S. 542 (2010).

Although the court has the discretion to enhance the lodestar calculation of attorney fees, the lodestar is presumptively reasonable and enhancements should rarely be granted. Enhancements should be granted only when the prevailing party produces objective and specific evidence that enhancement is necessary to provide reasonable compensation because the lodestar did not take into account a factor that may be properly considered in determining a reasonable fee. *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056, citing *Perdue v. Kenny A.*, 559 U.S. 542 (2010). Nearly all of the factors listed in Prof.Cond.R. 1.5(a) should be subsumed in the lodestar calculation without requiring enhancements. *Id.*

9. TIME VALUE OF MONEY (OPTIONAL).

COMMENT

In *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-1056, the Supreme Court of Ohio held that a party seeking an enhancement to the calculation of attorney fees based on the lodestar calculation bears the burden of presenting specific evidence to establish that an adjustment is appropriate based on a factor not already subsumed within the lodestar. The Court did not identify what circumstances constitute an enhancement factor but agreed with the United States Supreme Court's conclusion that, in a rare and exceptional case, the lodestar may be enhanced when it can be shown that superior results are the result of superior performance and that the lodestar does not adequately measure the true market value of the attorney's services. *See id.* In a separate concurrence, one justice identified a possible enhancement factor: the time value of money. *See Phoenix Lighting Group*, ___ Ohio St.3d ___, 2020-Ohio-1056 (Fischer, J., concurring). No controlling opinion in Ohio expressly endorses this type of "delay enhancement."

Whether the time value of money is an attorney fee enhancement factor under Ohio law is unsettled. Although no justice joined in Justice Fischer's concurrence, the Supreme Court of Ohio has repeatedly turned to federal case law to inform Ohio's approach to attorney fee awards. Multiple federal courts have recognized the

time value of money as a possible enhancement factor. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir.1985). Other federal courts have treated it as the lodestar factor that permits the use of current hourly rates for past work. *See, e.g., Grant v. Martinez*, 973 F.2d 96 (2d Cir.1992); *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292 (11th Cir.1988). The United States Supreme Court has held that "an enhancement for delay in payment is, where appropriate, part of a 'reasonable attorney's fee.' " *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989). That holding did not definitively pick one treatment but stated that that "an appropriate adjustment for delay in payment" could be "by the application of current rather than historic hourly rates or otherwise." *Id.* at 284.

The Committee takes no position on whether a time-value-of-money enhancement is part of Ohio law. If the trial judge decides that it is, the Committee believes that whether the time value of money should permit use of current rates in calculating the lodestar or justify a multiplier to enhance the lodestar likely would depend on the facts of the litigation involved. The Committee also believes that the prevailing party would have to produce objective and specific evidence that the time value of money justifies an enhancement before such an instruction may be given.

If the trial judge elects to treat the time value of money as a factor in calculating the lodestar, the trial court should modify the lodestar instructions as needed. If the trial court elects to treat the time value of money as a multiplier to the lodestar, the following possible instruction tracks Justice Fischer's concurrence:

In deciding whether an enhancement to the initial calculation of attorney fees is appropriate, you may consider that (a prevailing party who has paid his/her/its attorneys over the course of the lawsuit) (an attorney working on a contingent-fee basis) may have been deprived of the use of his/her/its money throughout the lawsuit. To reasonably compensate that (party) (attorney) when he/she/it is awarded attorney fees, you may award the present value of the attorney fees and may consider the period of time the attorney worked on the case and any unreasonable delays caused by the parties, as well as the type of fee agreement entered into between the attorney and (*insert name of prevailing party*).

10. INTERROGATORIES.

COMMENT

A trial court must provide a reasonably specific explanation for all aspects of an attorney fee determination. *Phoenix Lighting Group*, ___ Ohio St.3d ___, 2020-Ohio-1056. Additionally, any modification to the loadstar calculation "must be accompanied by a rationale justifying the modification." *Id.* ¶ 20. Therefore, if the trial judge submits the amount of attorney fees to the jury, the judge should draft appropriate interrogatories depending on the specific fee-related issues in contention to provide a specified rationale for the fee award.

CV 315.41 Quotient verdict *[Rev. 12-11-10]*

1. If you find for the plaintiff, you may not agree in advance to accept an average figure

as the amount of your verdict. If a figure is reached by obtaining an average, such amount is not a proper verdict unless each juror thereafter individually exercises his or her judgment and decides whether he or she will accept such amount. At least six (6) members of the jury must individually accept the amount before it can be a fair and just verdict.

CV 315.43 Mortality table *[Rev. 12-11-10]*

1. PERMANENT INJURY. If you find that plaintiff's injury is permanent, you may consider how long the plaintiff is likely to live.

2. MORTALITY TABLE. The evidence of the life expectancy of people (*insert age of plaintiff*) years of age is an estimate of the average remaining length of life of all persons in this country based upon a limited number of persons of that age. It is an incomplete figure and does not indicate the future life-span of any individual. Such evidence is not conclusive; however, you may consider it along with all the other evidence.

3. DEATH. If you find for the plaintiff, you may consider what the probable normal length of life of the decedent would have been.

CV 315.45 Present value of future damage; income taxes *[Rev. 10/3/15]*

1. PRESENT PECUNIARY VALUE. In the event you find for the plaintiff, the measure of any future damage is the present (loss in dollars) (pecuniary loss) that the plaintiff with reasonable certainty will sustain in the future and that is capable of measurement by the present value of money. You may not speculate upon any change in the value of the dollar.

2. INCOME TAXES. OJI-CV 315.01 § 5.

CV 315.49 Wrongful death, compensatory damages *[Rev. 1-21-12]*

1. GENERAL. If you find for the plaintiff you will decide what sum of money will compensate the beneficiaries for the injury and loss to them resulting from the wrongful death of (*insert name of decedent*).

2. DAMAGES. When deciding damages suffered by reason of the wrongful death, you may consider the following:

(A) loss of support from the reasonably expected earning capacity of (*insert name of decedent*);

(B) loss of services of (*insert name of decedent*);

(C) loss of the society of (*insert name of decedent*), including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education suffered by the surviving spouse, dependent children, parents, or next of kin;

(D) loss of prospective inheritance to (*insert name of decedent*)'s heirs at law at the time of his/her death; and

(E) the mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin.

COMMENT

R.C. 2125.02.

The court should eliminate from its charge any factors that are not in evidence.

"Next of kin" and "heirs at law" are not necessarily synonymous terms. "Next of kin" means the nearest surviving relative to the decedent after accounting for parents, children, or spouse. *See In re Estate of Payne*, 10th Dist. No. 04AP-1176, 2005-Ohio-2391. The Committee believes that "heirs at law" means those people entitled to inherit under the laws of testate and intestate succession.

3. REASONABLE FUNERAL AND BURIAL EXPENSES. In addition to an award of compensatory damages, you may make an award for the reasonable funeral and burial expenses, if the plaintiff has established these expenses by the greater weight of the evidence.

COMMENT

R.C. 2125.02(A)(2) provides that the award for funeral and burial expenses must be set forth separately in the verdict.

CV 315.51 Duty to mitigate *[Rev. 12-11-10]*

1. DUTY TO MITIGATE. The defendant claims the plaintiff failed to mitigate his/her damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not (use reasonable diligence) (make reasonable efforts) under the facts and circumstances in evidence to (avoid loss) (lessen damages) caused by the defendant's negligence, you should not allow damages that could have been avoided by (the exercise of reasonable diligence) (reasonable efforts to avoid loss). The plaintiff, however, is not required to take measures that would involve undue risk, burden, or humiliation.

2. MEDICAL OR SURGICAL TREATMENT REASONABLY NECESSARY (ADDITIONAL). If the nature of the injury is such as to render medical or surgical treatment reasonably necessary, it is the duty of the person injured to use ordinary and reasonable diligence to secure the medical or surgical aid. In deciding whether a duty exists to undergo surgical treatment to correct a condition, you may consider the degree of risk involved to the plaintiff in such a procedure and the advice and recommendations of the plaintiff's treating doctor and/or surgeon.

CV 315.53 Nominal damages *[Rev. 1-21-12]*

1. GENERAL. If you find for the plaintiff but the plaintiff failed to prove by the greater weight of the evidence any amount of damages, you may award the plaintiff nominal damages. "Nominal" means trifling or small.

COMMENT

Drawn from *Lacey v. Laird*, 166 Ohio St. 12 (1956).

If actual damages are an element of a claim for relief, then nominal damages alone are not recoverable and an instruction on an award of nominal damages is not appropriate. *Younce v. Baker*, 9 Ohio App.2d 259 (2d Dist. 1966).

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Chapter CV 425

GOVERNMENTAL LIABILITY

(The following instructions apply to claims arising after November 30, 1985, except for damage limits in R.C. 2744.05 which may apply to earlier claims.)

CV 425.01 Negligent operation of motor vehicles R.C. 2744.02(B)(1) (modifying former R.C. 701.02)

1. GENERAL. The defendant (*identify the governmental unit*) is a political subdivision of the State of Ohio. (Except for emergency situations which the court will describe,) a political subdivision is liable if its employee causes (injury) (death) (damage) by the negligent operation of a motor vehicle upon the public roads, highways, or streets, while the employee is engaged within the scope of his employment and authority.

COMMENT

R.C. 2744.01(F) defines a "political subdivision." Whether a particular governmental unit is a "political subdivision" will be a question of law.

2. IMMUNITY FOR EMERGENCIES.

(A) POLICE EMERGENCIES. A political subdivision has no legal responsibility for damage caused by a member of its police (department) (agency) who was

operating a motor vehicle while responding to an emergency call.

COMMENT

R.C. 2744.02(B)(1)(a).

(1) EMERGENCY CALL. An "emergency call" means a call to duty including, but not limited to (communications from citizens) (police dispatches) (personal observations by peace officers of inherently dangerous situations) that demand an immediate response on the part of a peace officer.

COMMENT

R.C. 2744.01(A) (no counterpart in former statute).

(2) RESPOND. An officer responds to an emergency call if he reasonably believes there is an urgent call to duty, regardless of the presence or absence of any actual danger or any actual need for the officer's presence there.

COMMENT

Agnew v. Porter (1970), 23 Ohio St.2d 18, 52 O.O.2d 79, 260 N.E.2d 830; *Lingo v. Hoekstra* (1964), 176 Ohio St. 417, 27 O.O.2d 384, 200 N.E.2d 325; *Fish v. Coffey* (1986), 33 Ohio App.3d 129, 514 N.E.2d 896; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 495 N.E.2d 462.

(B) FIRE EMERGENCIES. A political subdivision has no legal responsibility for damage caused by a member of its (fire department) (firefighting agency), when he was operating a motor vehicle while (proceeding toward a place where a fire was ([in progress] [believed to be in progress]) (answering an emergency alarm).

COMMENT

R.C. 2744.02(B)(1)(b) (modifies former R.C. 701.02).

(C) EMERGENCY MEDICAL SERVICE. A political subdivision has no legal responsibility for damage caused by a member of an emergency medical service which it (owns) (operates), when he was operating a motor vehicle with a valid (driver's) (commercial driver's) license, while (responding to) (completing) a call for emergency medical care, and while complying with precautions for emergency vehicles.

COMMENT

R.C. 2744.02(B)(1)(c).

(1) PRECAUTIONS FOR EMERGENCY VEHICLES. The driver of an (emergency) (public safety) vehicle, when responding to an emergency call, upon approaching a (red or stop signal) (stop sign), shall slow down as necessary for safety to traffic, but may proceed cautiously past such (red or stop signal) (stop sign) with due regard for the safety of all persons using the street or highway.

COMMENT

R.C. 4511.03. Only emergency *medical* vehicles need comply with R.C. 4511.03 to maintain immunity, but any emergency vehicle's failure to comply with R.C. 4511.03 may constitute wilful or wanton misconduct which precludes immunity.

(D) EXCEPTION TO IMMUNITY. However, a political subdivision is always legally responsible when its employee's operation of a motor vehicle constitutes wilful or wanton misconduct.

(1) WILFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

3. BURDEN OF PROOF.

(A) GENERAL. In order to recover, the plaintiff must prove by the greater weight of the evidence that the political subdivision's employee negligently caused the plaintiff's (injury) (death) (damage).

(B) EMERGENCY DEFENSE. The political subdivision can avoid liability if it proves by the greater weight of the evidence that its employee's emergency situation excused its responsibility for any employee negligence. (However, the plaintiff can still recover if the plaintiff proves by the greater weight of the evidence that the political subdivision's employee operated the vehicle in a wilful or wanton manner, so the political subdivision lost any special protection for emergency activities.)

CV 425.03 Negligence in proprietary functions R.C. 2744.02(B)(2) (claims arising on and after 9/9/07) *[Rev. 11/18/17]*

1. GENERAL. The plaintiff claims that the defendant (*identify the governmental unit*) negligently caused (injury) (death) (damages) to the plaintiff. The defendant

(*Use appropriate alternative[s]*)

(A) denies negligence;

(*or*)

(B) claims that it is immune from liability.

2. PROOF OF CLAIM. The plaintiff must prove by the greater weight of the evidence that the defendant's employee caused (injury) (death) (damages) by his/her negligent performance of (*describe asserted* act), which is a proprietary function of the defendant.

COMMENT

Drawn from R.C. 2744.02(B)(2).

The Committee believes that whether an asserted function of a political subdivision is a propriety function is a question of law. R.C. 2744.01 defines "proprietary function." If the trial court finds that a propriety function is involved, the court should give the foregoing instruction. If the court finds that no propriety function is involved, no instruction under this section will be needed and the defendant is entitled to immunity under R.C. 2744.02(A).

3. NEGLIGENCE. OJI-CV 401.01.

4. EMPLOYEE. R.C. 2744.01.

5. INDEPENDENT CONTRACTOR. OJI-CV 423.09.

6. PROXIMATE CAUSE. OJI-CV Chapter 405.

7. DAMAGES. OJI-CV Chapter 315.

8. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) SPONSORSHIP OF A COMMUNITY SCHOOL.

COMMENT

The Committee believes that, if the defendant is a sponsor of a community school or an officer, director, or employee of the sponsor and the allegation in the complaint involves the monitoring or overseeing of that school, the defendant is immune from civil liability. Each of these questions are a matter of law for the court to decide. R.C. 3314.07(E).

(C) CONDUCTING VOLUNTARY ACTION OR MAINTENANCE ACTIVITIES.

(1) The defendant claims that it is a/an (political subdivision) (officer or employee of a political subdivision) that is not liable for (injury) (death) (damages) because it was conducting (a voluntary action) (maintenance activities) on (land) (an easement) (a right-of-way) that was (owned) (leased) (held) by the defendant and the plaintiff's (injury) (death) (damages) resulted from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petroleum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law and no action or omission of the defendant or

the defendant's employee constituted willful or wanton misconduct or intentionally tortious conduct.

(2) If you find by the greater weight of the evidence that the defendant was a political subdivision performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful or wanton misconduct or intentionally tortious conduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(2).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(2). Instead, the immunity conferred by R.C. 3746.24(B)(2) applies to the political subdivision.

Pursuant to R.C. 3746.24(B), whether a voluntary action was being or had been "conducted under the law" means conducted under R.C. Chapter 3746 and rules adopted under it. The Committee believes that this is ordinarily a question of law. If there is a factual issue involved, the trial court should fashion appropriate instructions for the jury on that factual issue.

(D) PUBLIC UTILITY.

(1) The defendant claims that it is not liable for (injury) (death) (damages) because it was a public utility and was performing work

(*Use appropriate alternative*)

(a) in a/an (easement) (right-of-way) of the public utility across property where a voluntary action (was being) (had been) conducted and where the public utility (was constructing) (had) main or distribution lines above or below the surface of the ground for purposes of (maintaining the [easement] [right-of-way]) (the [construction] [repair] [replacement] of its [lines] [poles] [towers] [foundations] [*describe structure supporting or sustaining any such lines*] [appurtenances to (*describe structures*)]).

(*or*)

(b) on property where a voluntary action was being conducted that was necessary to (establish) (maintain) utility service to the property, including, without limitation, the (construction) (repair) (replacement) of (main or distribution lines above or below the surface of the ground) ([poles] [towers] [foundations] [*describe other structures supporting or sustaining any such lines*]) (appurtenances to [*describe structures*]).

(2) The defendant claims that the plaintiff's claim results from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petro-

leum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law.

(3) If you find by the greater weight of the evidence that the defendant was a public utility performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful, wanton, or intentional misconduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(4).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(4). Instead, the immunity conferred by R.C. 3746.24(B)(4) applies to the political subdivision.

(E) DEFINITIONS:

(1) VOLUNTARY ACTION. R.C. 3746.01.

(2) HAZARDOUS SUBSTANCE. R.C. 3746.01.

(3) PETROLEUM. R.C. 3746.01.

(4) WILLFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

(5) PUBLIC UTILITY. "Public utility" includes, without limitation, a person engaged in the storage and transportation of natural gas.

COMMENT

R.C. 3746.24(A)(2).

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

CV 425.05 Maintenance of roads and bridges R.C. 2744.02(B)(3) (claims arising on and after 9/9/07) *[Rev. 11/18/17]*

1. GENERAL. The plaintiff claims that the defendant (*identify the governmental unit*) negligently caused (injury) (death) (damages) to the plaintiff. The defendant

(*Use appropriate alternative[s]*)

(A) denies negligence;

(*or*)

(B) claims that it is immune from liability.

2. PROOF OF CLAIM. The plaintiff must prove by the greater weight of the evidence that the defendant's employee caused (injury) (death) (damages) by his/her negligent failure to (keep public roads in repair) (remove obstructions from public roads).

COMMENT

Drawn from R.C. 2744.02(B)(3).

R.C. 2744.02(B)(3) imposes liability for the specified negligent actions of political subdivisions of the state of Ohio unless an exception under R.C. 2744.02(B) applies. R.C. 2744.01 defines "political subdivision." Whether a particular governmental unit is a "political subdivision" of the state of Ohio is a question of law.

3. NEGLIGENCE. OJI-CV 401.01.

4. EMPLOYEE. R.C. 2744.01.

5. INDEPENDENT CONTRACTOR. OJI-CV 423.09.

6. PUBLIC ROADS. "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within the defendant's geographic area. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices. (An edge drop at the limit of the paved road is a part of the berm or shoulder and does not come within the definition of a public road.)

COMMENT

Drawn from R.C. 2744.01; *Baker v. Wayne Cty.*, 147 Ohio St.3d 51, 2016-Ohio-1566.

For a list of what is within a defendant's geographic area, see the definition of "political subdivision" in R.C. 2744.01.

The Committee believes that whether a traffic control device is mandated by the Ohio manual of uniform traffic control devices is a question of law. The trial court should instruct the jury as to whether the traffic control device is so mandated.

7. BERM. "Berm" means the shoulder of the road.

COMMENT

Drawn from *Baker v. Wayne Cty.*, 147 Ohio St.3d 51, 2016-Ohio-1566.

8. SHOULDER. "Shoulder" means either the edge of a roadway or the part of a roadway outside of the traveled way on which vehicles may be parked in an emergency.

COMMENT

Drawn from *Baker v. Wayne Cty.*, 147 Ohio St.3d 51, 2016-Ohio-1566.

9. TRAFFIC CONTROL DEVICE. R.C. 4511.01.

COMMENT

"Traffic control device" as used in R.C. 2744.01 has the same meaning as used in R.C. 4511.01. *Bibler v. Stevenson*, 150 Ohio St.3d 144, 2016-Ohio-8449 (plurality).

10. IN REPAIR. "In repair" means maintaining a road's condition after construction or reconstruction. It includes fixing holes and crumbling pavement and deals with repairs after deterioration, for example, of a road or disassembly of a bridge. It does not encompass the design or construction of roadways.

COMMENT

Drawn from *Deitz v. Harshbarger*, 3d Dist. Shelby No. 17-16-21, 2017-Ohio-2917.

11. OBSTRUCTION. "Obstruction" means an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so.

COMMENT

Howard v. Miami Twp. Fire Dept., 119 Ohio St.3d 1, 2008-Ohio-2792.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

14. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) BRIDGE WITHIN MUNICIPAL CORPORATION.

(1) The defendant claims that it is not liable for (injury) (death) (damages) caused by its employee's failure to (keep public roads in repair) (remove obstructions from public roads) because the bridge involved in the (injury) (death) (damage) incurred by the plaintiff was within the defendant's territory and the defendant is a municipal corporation that has no responsibility for maintaining or inspecting a bridge within its territory.

(2) If you find by the greater weight of the evidence that the defendant is a municipal corporation and that the bridge involved in the (injury) (death) (damage) incurred by the plaintiff was within the defendant's territory and the defendant is a municipal corporation that has no responsibility for maintaining or inspecting a bridge, then you must find for the defendant.

COMMENT

Drawn from R.C. 2744.02(B)(3); *Carney v. McAfee*, 35 Ohio St.3d 52 (1988).

(C) CONDUCTING VOLUNTARY ACTION OR MAINTENANCE ACTIVITIES.

(1) The defendant claims that it is a/an (political subdivision) (officer or employee of a political subdivision) that is not liable for (injury) (death) (damages) because it was conducting (a voluntary action) (maintenance activities) on (land) (an easement) (a right-of-way) that was (owned) (leased) (held) by the defendant and the plaintiff's (injury) (death) (damages) resulted from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petroleum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law and no action or omission of the defendant or the defendant's employee constituted willful or wanton misconduct or intentionally tortious conduct.

(2) If you find by the greater weight of the evidence that the defendant was a political subdivision performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful or wanton misconduct or intentionally tortious conduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(2).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(2). Instead, the immunity conferred by R.C. 3746.24(B)(2) applies to the political subdivision.

Pursuant to R.C. 3746.24(B), whether a voluntary action was being or had been "conducted under the law" means conducted under R.C. Chapter 3746 and rules adopted under it. The Committee believes that this is ordinarily a question of law. If there is a factual issue involved, the trial court should fashion appropriate instructions for the jury on that factual issue.

(D) PUBLIC UTILITY.

(1) The defendant claims that it is not liable for (injury) (death) (damages) because

it was a public utility and was performing work

(*Use appropriate alternative*)

(a) in a/an (easement) (right-of-way) of the public utility across property where a voluntary action (was being) (had been) conducted and where the public utility (was constructing) (had) main or distribution lines above or below the surface of the ground for purposes of (maintaining the [easement] [right-of-way]) (the [construction] [repair] [replacement] of its [lines] [poles] [towers] [foundations] [*describe structure supporting or sustaining any such lines*] [appurtenances to (*describe structures*)]).

(*or*)

(b) on property where a voluntary action was being conducted that was necessary to (establish) (maintain) utility service to the property, including, without limitation, the (construction) (repair) (replacement) of (main or distribution lines above or below the surface of the ground) ([poles] [towers] [foundations] [*describe other structures supporting or sustaining any such lines*]) (appurtenances to [*describe structures*]).

(2) The defendant claims that the plaintiff's claim results from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petroleum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law.

(3) If you find by the greater weight of the evidence that the defendant was a public utility performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful, wanton, or intentional misconduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(4).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(4). Instead, the immunity conferred by R.C. 3746.24(B)(4) applies to the political subdivision.

(E) DEFINITIONS:

(1) VOLUNTARY ACTION. R.C. 3746.01.

(2) HAZARDOUS SUBSTANCE. R.C. 3746.01.

(3) PETROLEUM. R.C. 3746.01.

(4) WILLFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

(5) PUBLIC UTILITY. "Public utility" includes, without limitation, a person engaged in the storage and transportation of natural gas.

COMMENT

R.C. 3746.24(A)(2).

15. CONCLUSION. OJI-CV Chapter 313.

16. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

CV 425.07 Negligence within government buildings or grounds R.C. 2744.02(B)(4) (claims arising on and after 9/9/07) *[Rev. 11/18/17]*

1. GENERAL. The plaintiff claims that the defendant (*identify the governmental unit*) negligently caused (injury) (death) (damages) to the plaintiff. The defendant

(*Use appropriate alternative[s]*)

(A) denies negligence;

(*or*)

(B) claims that it is immune from liability.

2. PROOF OF CLAIM. The plaintiff must prove by the greater weight of the evidence that the defendant's employee caused (injury) (death) (damages) by his/her negligence that occurred (within) (on the grounds of), and was due to physical defects (within) (on the grounds of), a building used in connection with the performance of a governmental function.

COMMENT

Drawn from R.C. 2744.02(B)(4).

R.C. 2744.02(B)(4) imposes liability for the specified negligent actions of political subdivisions of the state of Ohio unless an exception under R.C. 2744.02(B) applies. R.C. 2744.01 defines "political subdivision." Whether a particular governmental unit is a "political subdivision" of the state of Ohio is a question of law.

3. NEGLIGENCE. OJI-CV 401.01.

4. EMPLOYEE. R.C. 2744.01.

5. INDEPENDENT CONTRACTOR. OJI-CV 423.09.

6. PHYSICAL DEFECTS. "Physical defect" means a perceivable imperfection that diminishes the worth or utility of the object at issue.

COMMENT

Drawn from *Leasure v. Adena Local Sch. Dist.*, 4th Dist. Ross No. 11CA3249,

2012-Ohio-3071.

7. BUILDING USED IN CONNECTION WITH THE PERFORMANCE OF A GOVERNMENTAL FUNCTION. "Building used in connection with the performance of a governmental function" includes, but is not limited to, office buildings and courthouses, but does not include jails, places of juvenile detention, workhouses, or other detention facility.

COMMENT

Drawn from R.C. 2744.02(B)(4). The list of buildings named in R.C. 2744.02(B)(4) is a nonexclusive list. *Moore v. Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250.

8. GOVERNMENTAL FUNCTION. R.C. 2744.01.

9. DETENTION FACILITY. R.C. 2921.01.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

12. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CONDUCTING VOLUNTARY ACTION OR MAINTENANCE ACTIVITIES.

(1) The defendant claims that it is a/an (political subdivision) (officer or employee of a political subdivision) that is not liable for (injury) (death) (damages) because it was conducting (a voluntary action) (maintenance activities) on (land) (an easement) (a right-of-way) that was (owned) (leased) (held) by the defendant and the plaintiff's (injury) (death) (damages) resulted from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petroleum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law and no action or omission of the defendant or the defendant's employee constituted willful or wanton misconduct or intentionally tortious conduct.

(2) If you find by the greater weight of the evidence that the defendant was a political subdivision performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful or wanton misconduct or intentionally tortious conduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(2).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(2). Instead, the immunity conferred by R.C. 3746.24(B)(2) applies to the political subdivision.

Pursuant to R.C. 3746.24(B), whether a voluntary action was being or had been "conducted under the law" means conducted under R.C. Chapter 3746 and rules adopted under it. The Committee believes that this is ordinarily a question of law. If there is a factual issue involved, the trial court should fashion appropriate instructions for the jury on that factual issue.

(C) PUBLIC UTILITY.

(1) The defendant claims that it is not liable for (injury) (death) (damages) because it was a public utility and was performing work

(*Use appropriate alternative*)

(a) in a/an (easement) (right-of-way) of the public utility across property where a voluntary action (was being) (had been) conducted and where the public utility (was constructing) (had) main or distribution lines above or below the surface of the ground for purposes of (maintaining the [easement] [right-of-way]) (the [construction] [repair] [replacement] of its [lines] [poles] [towers] [foundations] [*describe structure supporting or sustaining any such lines*] [appurtenances to (*describe structures*)]).

(*or*)

(b) on property where a voluntary action was being conducted that was necessary to (establish) (maintain) utility service to the property, including, without limitation, the (construction) (repair) (replacement) of (main or distribution lines above or below the surface of the ground) ([poles] [towers] [foundations] [*describe other structures supporting or sustaining any such lines*]) (appurtenances to [*describe structures*]).

(2) The defendant claims that the plaintiff's claim results from the (presence of [hazardous substances] [petroleum] at) (release of [hazardous substances] [petroleum] from) a property where (a voluntary action) (maintenance activities) was/were being or had been conducted under the law.

(3) If you find by the greater weight of the evidence that the defendant was a public utility performing work as described in these instructions and that no action or omission of the defendant or the defendant's employee when performing the work constituted willful, wanton, or intentional misconduct, then you must find for the defendant.

COMMENT

Drawn from R.C. 3746.24(B)(4).

Pursuant to R.C. 3746.24(C)(4), R.C. 2744.02(B)(2) does not apply to a political subdivision with respect to the conduct of an activity described in division R.C. 3746.24(B)(4). Instead, the immunity conferred by R.C. 3746.24(B)(4) applies to the political subdivision.

(D) DEFINITIONS:

(1) VOLUNTARY ACTION. R.C. 3746.01.

(2) HAZARDOUS SUBSTANCE. R.C. 3746.01.

(3) PETROLEUM. R.C. 3746.01.

(4) WILLFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

(5) PUBLIC UTILITY. "Public utility" includes, without limitation, a person engaged in the storage and transportation of natural gas.

COMMENT

R.C. 3746.24(A)(2).

13. CONCLUSION. OJI-CV Chapter 313.

14. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

CV 425.09 Civil liability expressly imposed by a Revised Code section R.C. 2744.02(B)(5) (claims arising on and after 9/29/07) *[Rev. 2/24/18]*

1. GENERAL. The plaintiff claims that the defendant (*identify the governmental unit*) caused (injury) (death) (damages) to the plaintiff. The defendant

(*Use appropriate alternative[s]*)

(A) denies (*describe conduct denied*);

COMMENT

Unlike R.C. 2744.02(B)(1) through (4), R.C. 2744.02(B)(5) is not limited to negligent actions. Therefore, the conduct involved need not be negligent in nature. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946.

(*or*)

(B) claims that it is immune from liability.

2. PROOF OF CLAIM. The plaintiff must prove by the greater weight of the evidence that the defendant's employee caused the plaintiff's (injury) (death) (damages) by (*describe the employee's conduct creating liability under R.C. 2743.02, R.C. 5591.37, or other Revised Code section*).

COMMENT

Drawn from R.C. 2744.02(B)(5).

R.C. 2744.02(B)(5) imposes liability for the specified actions of political subdivisions of the state of Ohio only if a Revised Code section expressly imposes liability. "Expressly" means "in direct or unmistakable terms." *Butler v. Jordan*, 92 Ohio St.3d 354 (2001) (plurality). Civil liability does not exist merely because a section imposes a responsibility or mandatory duty upon a political subdivision, because a section provides for a criminal penalty, because of a general authorization that a political subdivision may be sued, or because a section uses the term "shall" in a provision pertaining to a political subdivision. *See* R.C. 2744.02(B)(5).

R.C. 2744.01 defines "political subdivision." Whether a particular governmental unit is a "political subdivision" of the state of Ohio is a question of law.

The trial judge should draft appropriate instructions for the applicable Revised Code section, including all definitional instructions and affirmative defenses relevant to that section.

3. EMPLOYEE. R.C. 2744.01.

4. PROXIMATE CAUSE. OJI-CV Chapter 405.

5. DAMAGES. OJI-CV Chapter 315.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

CV 425.11 Defenses—immunities R.C. 2744.03 (claims arising on and after 4/9/03) *[Rev. 2/24/18]*

COMMENT

R.C. 2744.02(A)(1) provides a general grant of immunity to political subdivisions and their employees. R.C. 2744.02(B) establishes statutory exceptions to this grant of immunity. R.C. 2744.03 then provides for defenses or immunities relating to acts or omissions not protected under the general grant of immunity.

1. GENERAL. The plaintiff claims that (*identify the political subdivision*) (*insert name of the defendant political subdivision employee*) caused (injury) (death) (damages) to the plaintiff. The defendant claims that he/she/it is immune from liability.

2. PROOF OF DEFENSE. The defendant claims that he/she/it is not liable for (injury) (death) (damages) caused by (*describe employee's conduct creating liability*). You must find for the defendant if you find by the greater weight of the evidence that

(*Use appropriate alternative[s]*)

COMMENT

R.C. 2744.03(A)(1) through (5) apply only to a political subdivision. R.C. 2744.03(A)(6) applies only to a political subdivision employee, not to a political subdivision. R.C. 2744.03(A)(7) applies to both a political subdivision and a political subdivision employee.

(A)(1) (*insert name of the political subdivision's employee*) was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function;

COMMENT

Drawn from R.C. 2744.03(A)(1).

The Committee believes that whether a defendant has established the elements of the defense provided in R.C. 2744.03(A)(1) is ordinarily a question of law. The trial judge should give an instruction on R.C. 2744.03(A)(1) and any necessary definitions only if there is a factual issue relevant to application of the defense.

(*or*)

(A)(2) (*insert name of the political subdivision's employee*) was engaged in conduct that was not negligent and was ([required] [authorized] by law) ([necessary] [essential] to the exercise of powers of the [*insert name of political subdivision*] [*insert name of the political subdivision's employee*]);

COMMENT

Drawn from R.C. 2744.03(A)(2).

(*or*)

(A)(3) the (act) (failure to act) of (*insert name of the political subdivision's employee*) was within the discretion of (*insert name of the political subdivision's employee*) with respect to (policy-making) (planning) (enforcement powers) by virtue of his/her duties and the responsibilities of his/her (office) (position);

COMMENT

Drawn from R.C. 2744.03(A)(3).

The Committee believes that whether a defendant has established the elements of the defense provided in R.C. 2744.03(A)(1) is ordinarily a question of law. The trial judge should give an instruction on R.C. 2744.03(A)(1) and any necessary

definitions only if there is a factual issue relevant to application of the defense.

(*or*)

(A)(4) the (act) (failure to act) of (*insert name of the political subdivision's employee*) resulted in (injury) (death) (damages) to a (person who had [been convicted of] [pleaded guilty to] a criminal offense and who, at the time of the [injury] [death] [damages], was serving any portion of the person's sentence by performing community service work for or within the [*insert name of the political subdivision*]) (child who was found to be a delinquent child and who, at the time of the [injury] [death] [damages], was performing community [service] [work] for or within the [*insert name of the political subdivision*] in accordance with a juvenile court order) and the (person) (child) was covered under workers' compensation in connection with the community (service) (work) for or within the (*insert name of the political subdivision*);

COMMENT

Drawn from R.C. 2744.03(A)(4).

The Committee believes that whether the person performing community service work was doing so pursuant to R.C. 2951.02 or otherwise, whether the juvenile court order was entered pursuant to R.C. 2152.19 or R.C. 2152.20, or whether the person or child was covered under R.C. Chapter 4123 are questions of law. If there are factual issues involved in these determinations, the trial judge must give appropriate instructions.

For a list of what is within a political subdivision's geographic area, see the definition of "political subdivision" in R.C. 2744.01.

(*or*)

(A)(5) (*insert name of the political subdivision's employee*) exercised judgment or discretion in determining (whether to acquire) (how to use) any (equipment) (supplies) (materials) (personnel) (facilities) (*describe other resources*) and that exercise of judgment or discretion resulted in the plaintiff's (injury) (death) (damages), unless (*insert name of the political subdivision's employee*) exercised his/her judgment or discretion (with malicious purpose) (in bad faith) (in a wanton or reckless manner);

COMMENT

Drawn from R.C. 2744.03(A)(5).

(*or*)

(A)(6) he/she was (*describe circumstances granting a defense or immunity under the common law or established by the Revised Code*), unless his/her (acts) (omissions) were (manifestly outside the scope of his/her employment or official responsibilities) (with

malicious purpose) (in bad faith) (in a wanton or reckless manner);

COMMENT

Drawn from R.C. 2744.03(A)(6)(a) and (b). This defense applies only to a political subdivision employee, not to a political subdivision.

R.C. 2744.03(A)(6)(c) provides that an employee is not immune from liability when civil liability is expressly imposed upon the employee by a Revised Code section. "Expressly" means "in direct or unmistakable terms." *Butler v. Jordan*, 92 Ohio St.3d 354 (2001) (plurality). Civil liability does not exist merely because a section imposes a responsibility or mandatory duty upon an employee, because a section provides for a criminal penalty, because of a general authorization in a section that an employee may be sued, or because a section uses the term "shall" in a provision pertaining to an employee. *See* R.C. 2744.03(A)(6)(c).

R.C. 2744.03(B) provides that any defense for a political subdivision employee under R.C. 2744.03(A)(6) does not affect or limit the liability of a political subdivision for an act or omission of that employee under R.C. 2744.02.

(*or*)

(A)(7) (the [*insert name of political subdivision*]) ([*insert name of political subdivision's employee*] was a [county prosecuting attorney] [city director of law] [village solicitor] [*describe similar chief legal officer of a political subdivision*] [assistant of a (county prosecuting attorney) (city director of law) (village solicitor) (*describe similar chief legal officer of a political subdivision*)] [judge of a court of Ohio] and) was (*describe circumstances granting a defense or immunity under the common law or established by the Revised Code*).

COMMENT

Drawn from R.C. 2744.03(A)(7).

R.C. 2744.03(B) provides that any defense for a political subdivision employee under R.C. 2744.03(A)(7) does not affect or limit the liability of a political subdivision for an act or omission of that employee under R.C. 2744.02.

3. EMPLOYEE. R.C. 2744.01.

4. NEGLIGENCE. OJI-CV 401.01.

5. MALICIOUS PURPOSE. "Malicious purpose" means the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously through unlawful or unjustified conduct.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267,

2015-Ohio-3483.

6. BAD FAITH. "Bad faith" means a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of fraud.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483.

7. WANTON MISCONDUCT. "Wanton misconduct" means the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result.

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711.

8. RECKLESS CONDUCT. "Reckless conduct" means conduct characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711.

9. SCOPE OF EMPLOYMENT. Conduct is within the "scope of employment" if it is initiated in part to further or promote the employer's business. An employee's wrongful act, even if it is unnecessary, unjustified, excessive, or improper, does not automatically take the act manifestly outside the scope of employment. To be outside the scope of employment, an act must be so divergent that it severs the employer-employee relationship.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483.

CV 425.13 Statute of limitations R.C. 2744.04

CV 425.15 Damages OJI-CV Chapter 315

COMMENT

R.C. 2744.05 provides limitations on damages. This section applies to all cases which arose on or after November 20, 1985, and to some cases which arose prior thereto.

(Text continued on page 325)

Chapter CV 455

CIVIL RELIEF FOR CRIMINAL CONDUCT

CV 455.01 Civil remedy for person injured by criminal act *[Rev. 3/12/22]*

COMMENT

R.C. 2307.60(A)(1) creates a statutory claim for damages resulting from any criminal act unless specifically excepted by law. R.C. 2307.60(B)(1) to (3) set forth the situations specifically excepted by law. A criminal conviction or charge is not a prerequisite. In general, persons who engaged in conduct that, if prosecuted, would constitute a felony, a misdemeanor offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor offense of violence, are excepted from recovery if that conduct proximately caused the damages. Persons other than innocent bystanders are also excepted from recovery if the persons sustained damages from an act of self-defense, defense of another, or defense of a residence. Any person or the person's representative is excepted from recovery if the person's conduct, if prosecuted, would constitute a felony, a misdemeanor offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor offense of violence if the conduct the person engaged in against the victim was the proximate cause of the person's damages. *Buddenberg v. Weisdack*, Slip Op. No. 2020-Ohio-3832; *Jacobson v. Kaforey,* 149 Ohio St.3d 398, 2016-Ohio-8434.

1. GENERAL. The plaintiff claims that he/she suffered (injury) (damages) that (was) (were) proximately caused by the defendant's conduct, which constituted (*insert name of offense*).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find all of the following by the greater weight of the evidence: (*describe elements of offense with definitions*).

COMMENT

The elements from the applicable Ohio Revised Code section should be listed as the elements that the plaintiff must prove. The Committee recommends that practitioners use the OJI criminal jury instructions for the elements, definitions, and affirmative defenses. The plaintiff must prove the elements by a preponderance of the evidence and not the criminal standard of beyond a reasonable doubt.

See R.C. 2307.60(A)(2) for the admissibility of a prior conviction.

A template of the full instruction using arson, OJI-CR 509.03(A)(1), is provided below.

3. AFFIRMATIVE DEFENSE. OJI-CV 303.03 § 4; OJI-CV 303.09.

COMMENT

Defenses may include self-defense, defense of another, defense of residence. *See* OJI-CV 303.09.

4. EXAMPLE INSTRUCTION: ARSON.

(A) GENERAL. The plaintiff claims that he/she suffered (injury) (damages) proximately caused by the defendant's conduct, which constituted the criminal offense of arson.

(B) PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater of weight of the evidence that the defendant, by means of fire, knowingly caused physical harm to any property of the plaintiff without the plaintiff's consent.

(C) KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).

(D) CAUSATION. OJI-CR 417.23.

(E) PHYSICAL HARM TO PROPERTY. "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

COMMENT

R.C. 2901.01.

(F) PROPERTY. "Property" means any property, real or personal, tangible or intangible, and any interest or license in such property.

COMMENT

R.C. 2901.01.

5. PROXIMATE CAUSE. OJI-CV Chapter 405.

6. DAMAGES. OJI-CV Chapter 315.

COMMENT

R.C. 2307.60(A)(1) provides that anyone injured in person or property by a

criminal act may recover full damages including attorney fees and punitive damages if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state. *See* R.C. 2315.21 and OJI-CV Chapter 315.

In the event damages are being sought for the willful damage of property or theft, see R.C. 2307.61 for the limitation on damages.

7. CONCLUSION. OJI-CV Chapter 313.

(Text continued on page 458.7)

Chapter CV 501

CONTRACTS

CV 501.01 Breach of contract *[Rev. 4/17/21]*

1. GENERAL. The plaintiff claims that the defendant entered into a contract with him/her/it (to) (for) (*insert subject matter of contract*) and that the defendant (broke) (breached) the contract causing (damages) (loss) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the parties entered into a contract; and

(B) the defendant (broke) (breached) the contract by (*insert nature of breach[es] claimed by the plaintiff*); and

COMMENT

A plaintiff is entitled to recover damages for a breach by the defendant, whether or not the breach is material. *See Ashley v. Henahan*, 56 Ohio St. 559 (1897). However, if the defendant's breach is not material, the plaintiff is not excused from performing his/her/its duties under the contract. *Kichler's, Inc v. Persinger*, 24 Ohio App.2d 124 (1st Dist.1970); *H&H Glass, Inc., v. Empire Bldg. Co., LLC*, 1st Dist. Nos. C-150059, C-150227, 2016-Ohio-3029. *See* 1 Restatement of the Law 2d, Contracts, Section 237 (1981).

(C) the plaintiff (was not in material breach of) (had substantially performed his/her/its duties due under) the contract at the time of the defendant's breach; (and)

COMMENT

Substantial performance and the lack of a material breach are two sides of the same coin. The facts of the case, however, may make one form preferable. For example, using the language "was not in material breach of the contract at the time of the defendant's breach" may be less confusing where the plaintiff's performance has not yet occurred but has been excused by the defendant's own material breach of the contract. *Huntington Nat'l Bank v. Greer*, 3rd Dist. No. 14-15-26, 2016-Ohio-5100; *Davis v. J&J Concrete*, 11th Dist. No. 2018-T-0074, 2019-Ohio-1407.

If a condition precedent is in dispute, then the following element (D) must be included in the instruction. Element (D), however, will frequently not be in dispute because the contract contains no conditions precedent to the defendant's duties other than the plaintiff's own performance or compliance with those conditions has been excused by the defendant's breach.

(D) CONDITION PRECEDENT (ADDITIONAL).

(*Use appropriate alternative[s]*):

(1) the plaintiff has performed (*describe any condition precedent to the defendant's duties*);

(*or*)

(2) (*describe any condition precedent to the defendant's duties*) has occurred.

3. BREACH. A contract is (broken) (breached) when one party fails or refuses, in whole or in part, to perform his/her/its duties under the contract.

COMMENT

Drawn from *Nat'l City Bank of Cleveland v. Erskine & Sons, Inc.*, 158 Ohio St. 450 (1953).

The case law often includes in its definition of breach that the failure to perform must be without legal excuse. Because specific instructions will be given on any claimed excuse, there is no need to include the phrase "without legal excuse" in an instruction.

4. MATERIAL BREACH. "Material breach" means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight, or technical departures from the contract terms are not material breaches so long as they occur in good faith.

COMMENT

Drawn from *Ashley v. Henahan*, 56 Ohio St. 559 (1897); *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163 (1st Dist.1990); *Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc.*, 64 Ohio App.3d 639 (8th Dist.1989), *appeal dismissed*, 50 Ohio St.3d 705 (1990).

Some Ohio courts have also utilized the following five factors listed in 1 Restatement of the Law 2d, Contracts, Section 241 (1981), in deciding whether a breach is material. The trial judge may want to additionally instruct the jury that it may consider any of these factors that are applicable. The five factors are: (1) the extent to which the injured party will be deprived of the benefit which he/she/it reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of the benefit of which he/she/it will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his/her/its failure, taking account of all the circumstances including any reasonable assurances; (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Rhodes v. Rhodes Indus., Inc.*, 71 Ohio App.3d 797 (8th Dist.1991); *Molnar v. Castle Bail Bonds, Inc.*, 4th Dist. No. 04CA2808, 2005-Ohio-6643.

5. SUBSTANTIAL PERFORMANCE. "Substantial performance" means the absence of a breach that violates a term essential to the purpose of the contract. "Substantial performance" may include nominal, trifling, slight, or technical departures from the contract terms so long as the party acts in good faith.

COMMENT

Drawn from *Ashley v. Henahan*, 56 Ohio St. 559 (1897); *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2nd Dist. No. 20307, 2004-Ohio-4119; *Price v. KNL Custom Homes, Inc.*, 9th Dist. No. 26968, 2015-Ohio-436.

6. GOOD FAITH. "Good faith" means honesty in fact in the conduct or transaction; acting with an honest effort without purpose to mislead or deceive.

COMMENT

Drawn from R.C. 1301.201; *Takacs v. Baldwin*, 106 Ohio App.3d 196 (6th Dist. 1995); *Wells Fargo Bank v. Smith*, 12th Dist. No. CA2012-04-006, 2013-Ohio-855.

7. CONCLUSION. OJI-CV Chapter 313.

8. EXPECTATION DAMAGES. OJI-CV 501.33.

9. RELIANCE DAMAGES. OJI-CV 501.35.

10. RECISSION AND RESTITUTION. OJI-CV 501.37.

CV 501.03 Contract formation *[Rev. 4/17/21]*

1. GENERAL. A "contract" is an agreement or obligation, whether oral, written, or implied, in which one party becomes (bound) (obligated) to another to pay a sum of money or to perform, or omit to perform, a certain act or acts. It is not necessary that the parties use any particular words, perform any particular acts, or use any particular form of agreement in order to create a contract.

COMMENT

Drawn from *Terex Corp. v. Grim Welding Co.*, 58 Ohio App.3d 80 (1st Dist.1989); *National Glass and Lens Co. v. Parsons*, 28 Ohio Law Reptr. 573 (1928). Ohio courts have adopted numerous definitions of the term "contract." The definition stated in the instruction, however, has been used in many recent cases and is most consistent with modern contract law. Recent decisions have also adopted the definition in 1 Restatement of the Law 2d, Contracts, Section 1 (1981), which is "a promise or set of promises for which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *See Brownfield, Bowden, Bally and Sturtz v. Board of Ed.*, 56 Ohio App.2d 10 (4th Dist.1977); *Schenley v. Kauth*, 96 Ohio App.345 (9th Dist.1953).

2. FORMATION. In order to form a contract, the parties must mutually consent to the agreement(s) or obligation(s) undertaken by them. Mutual consent arises out of the intent of the parties as shown by the reasonable meaning of their words and conduct, and not from any unexpressed intention or understanding of either party. In deciding whether there was mutual consent, you should consider not only the words and conduct of the parties, but also the circumstances under which the words were used and the conduct occurred.

COMMENT

Drawn from *Ford v. Tandy Transp., Inc.*, 86 Ohio App.3d 364 (4th Dist.1993); *Schon v. Estate of Richardson*, 8th Dist. No. 44765, 1983 Ohio App. LEXIS 12346 (June 2, 1983).

Many Ohio decisions require that there is a "meeting of the minds" in order for there to be mutual consent. Ohio law is also clear, however, that this standard is objective and does not require that there be subjective agreement by the parties. The "meeting of the minds" language is not used in this instruction because the Committee believes that it is potentially misleading and no longer appears in modern contract doctrine, and that the instruction as written accurately conveys Ohio law. Should the trial judge prefer to use the "meeting of the minds" language, he/she should be certain that it is clear to the jury that a "meeting of the minds" is determined by the standard of a reasonable person based on the objective manifestations of the parties.

The requirement of consideration is not included in the instruction because whether or not a promise or performance constitutes consideration is decided by the judge as a matter of law. If a question of fact exists on which the legal conclusion of consideration rests, the judge can draft an appropriate interrogatory or interrogatories.

3. EXPRESS AND IMPLIED CONTRACTS (ADDITIONAL). A contract may be express or implied. An express contract is created by the words or writings of the parties. An implied contract arises from the parties' acts or conduct.

COMMENT

Drawn from *Lucas v. Constantini*, 13 Ohio App.3d 367 (12th Dist.1983).

CV 501.05 Offer and acceptance *[Rev. 4/17/21]*

COMMENT

Mutual consent often occurs through the process of offer and acceptance, although in many cases contracts will be concluded in a manner that will make it impossible to clearly identify an offeror or offeree, and in many cases it will be unnecessary to do so. In some cases, however, whether mutual consent exists is determined by specific rules regarding offer and acceptance. The trial judge can use this instruction to supplement OJI-CV 501.03 when necessary.

1. GENERAL. Mutual consent may occur through an offer and acceptance.

2. PLAINTIFF'S CLAIM—OFFER. The plaintiff claims that the (plaintiff made an offer that was accepted by the defendant) (defendant made an offer that was accepted by the plaintiff). An offer indicates a willingness to enter into a bargain or agreement, so that a reasonable person would understand that his/her/its consent to that bargain or agreement is invited and will conclude it.

COMMENT

Drawn from *Ford v. Tandy Transp., Inc.*, 86 Ohio App.3d 364 (4th Dist.1993);

Leaseway Distribution Centers, Inc. v. Dept. of Admin. Serv., 49 Ohio App.3d 99 (10th Dist.1988); *Foster v. Ohio State University*, 41 Ohio App.3d 86 (10th Dist.1987).

3. PLAINTIFF'S CLAIM—ACCEPTANCE. The plaintiff claims that the (plaintiff accepted the offer made by the defendant) (defendant accepted the offer made by the plaintiff). Acceptance may be made by word, sign, writing, or act. Unless the offer indicates that a particular manner of acceptance is required, an offer can be accepted in any manner that is reasonable under the circumstances. However, where a particular manner of acceptance is required by the offer, an acceptance made in some other manner is not effective to establish a contract.

COMMENT

Drawn from *Nilavar v. Osborn*, 127 Ohio App.3d 1 (2nd Dist.1998); 1 Restatement of the Law 2d, Contracts, Section 30 (1981). *See also* R.C. 1302.09 and *Uniform Commercial Code*, Section 2-206.

4. TIMELINESS OF ACCEPTANCE (ADDITIONAL). The plaintiff claims that the (plaintiff accepted the offer made by the defendant) (defendant accepted the offer made by the plaintiff) while the offer was still open. To be effective, the acceptance must have been communicated to the person making the offer or to someone authorized to receive the acceptance on behalf of the person making the offer while the offer was still open. To find that the offer was accepted in a timely manner, you must find by the greater weight of the evidence that the offer was accepted before.

(*Use appropriate alternative[s]*)

(A) (*insert time at which offer lapsed or was revoked*);

(*or*)

(B) a reasonable time passed from the time the offer was communicated to the (plaintiff) (defendant) (person authorized to accept the offer on behalf of the [plaintiff] [defendant]).

COMMENT

If there is an issue of fact as to when or if revocation occurred, see OJI-CV 501.05(5). If there is an issue of fact as to whether a person was authorized to accept an offer, see OJI-CV Chapter 423.

5. ACCEPTANCE BY MAIL OR SIMILAR MEANS OF TRANSMISSION (ADDITIONAL). If you decide that acceptance of the offer by (mail) (*insert similar means of transmission*) is a reasonable manner in which to accept the offer, the acceptance is effective at (the time the acceptance is deposited in the mail) (*insert time*

at which the acceptance was given to the carrier for transmission) whether or not it reaches the intended recipient. In order for the acceptance to be effective at (the time it is mailed) (*insert time at which the acceptance was given to the carrier for transmission*), it must have been properly addressed and posted.

COMMENT

Ohio courts appear to have adopted the "mailbox rule" under which an acceptance by mail is effective when deposited in the mailbox, although the Ohio Supreme Court has not so held. *See Adams v. Colonial Ins. Co.*, 121 Ohio App.3d 122 (8th Dist.1997); *Casto v. State Farm Mut. Ins. Co.*, 72 Ohio App.3d 410 (10th Dist.1991).

Ohio courts have generally not had the opportunity to determine whether the mailbox rule extends to other means of communication. 1 Restatement of the Law 2d, Contracts, Section 63 (1981) takes the position that the mailbox rule applies to any acceptance made in a manner and medium invited by the offeror. Ohio courts have given little indication how far they will extend the mailbox rule, but the Committee believes that it would at least be applied to means of communication similar to the mail (e.g., FedEx). *See Livingston v. Klopper*, 9 O. Dec. Rep. 185 (1884) (telegram). No Ohio appellate court has determined the applicability of the mailbox rule to electronic transmissions; however, the court in *Miller v. Plain Dealer Pub. Co.*, 8th Dist. No. 101335, 2015-Ohio-1016, suggested in dicta that the mailbox rule would not apply to e-mail messages.

6. REVOCATION OF OFFER. The plaintiff claims that the plaintiff accepted the defendant's offer before it was revoked by the defendant. Revocation occurs when an offer is withdrawn and is only effective when communicated to the person(s) to whom the offer was made or someone authorized to receive the revocation. To find for the plaintiff, you must find by the greater weight of the evidence that the offer was not revoked before the plaintiff accepted it.

COMMENT

The "mailbox rule" does not apply to revocations of offers. Revocations of offers must be received by the offeror or someone authorized to receive the revocation to be effective. *See Livingston v. Klopper*, 9 O. Dec. Rep. 185 (1884) (telegram); *Settles v. West Shell, Inc.*, 1st Dist. No. C-830907 (1984), 1984 Ohio App. LEXIS 11610; 1 Restatement of the Law 2d, Contracts, Section 42 (1981).

CV 501.07 Contract interpretation *[Rev. 4/17/21]*

COMMENT

The court must initially decide whether contract language is ambiguous and thus

requires extrinsic evidence to ascertain its meaning. When contract language is clear and unambiguous, interpretation of the agreement is an issue of law and it is error to submit its interpretation to the trier of fact. *DiGioia Bros. Excavating, Inc. v. Cleveland Dept. of Pub. Util., Div. Of Water*, 135 Ohio App.3d 436 (8th Dist.1999); *Wolfer Ent., Inc. v. Overbrook Development Corp.*, 132 Ohio App.3d 353 (1st Dist.1999). When the language of the contract is ambiguous, however, Ohio law is less clear. There are cases that categorically state that contract interpretation is a matter of law for the courts, and at least one which states that contract interpretation is a matter of law for the court even when the language is ambiguous. *See Logsdon v. Fifth Third Bank of Toledo*, 100 Ohio App.3d 333 (6th Dist.1994). Most of these cases, however, involve factual situations in which the language is unambiguous. In cases involving ambiguous language, most recent Ohio decisions, and modern contract doctrine generally, treat contract interpretation as a question of fact for the jury when extrinsic evidence is necessary to determine the meaning of a term of the contract. *See Pierce Point Cinema 10, LLC v. Perin-Tyler Family Found., LLC*, 12th Dist. No. CA2012-02-014, 2012-Ohio-5008; *Matheny v. Matheny*, 9th Dist. No. 12CA0046, 2013-Ohio-2946; *Indiana Ins. Co. v. Carnegie Constr., Inc.*, 104 Ohio App.3d 219 (2nd Dist.1995); *Jaworowski v. Med. Radiation Consultants*, 71 Ohio App.3d 320 (2nd Dist.1991).

1. GENERAL. The parties disagree as to the meaning of certain language in the contract. The plaintiff claims that (*describe plaintiff's understanding of disputed language*). The defendant claims that (*describe defendant's understanding of disputed language*). You must decide from all of the facts and circumstances in evidence what the parties intended the disputed language to mean.

2. INTENT OF THE PARTIES. You will decide the intent of the parties by looking at the contract as a whole, considering the subject matter and apparent purpose of the contract, all of the facts and circumstances in evidence surrounding the contract, and the reasonableness of the respective interpretations offered by the parties. You will decide their intention by giving the words of the contract their plain, ordinary, and reasonable meaning, unless the facts and circumstances in evidence indicate that the parties intended a different meaning. You are not to decide the parties' intent from any unexpressed intention or understanding of either party. Words that have acquired a particular meaning in the (trade) (profession) in which the parties are engaged will normally be given that meaning.

COMMENT

Drawn from *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 1997-Ohio-202. The uncommunicated subjective intentions of one party have no significance in determining the meaning of disputed terms and admission of evidence of such is error. *Myers v. Sunlight Laundry Co.*, 10 Ohio App. 275 (1st Dist.1918); *G.F. Business Equip., Inc. v. Liston*, 7 Ohio App.3d 223 (10th Dist. 1982); *Camardo v. Timm*, 8th Dist. No. 57795, 1990 Ohio App. LEXIS 5500 (Dec. 13, 1990); *Board of County Comm'rs v. Flanco Realty Co.*, 1st Dist. No. C-980781, 980803, 980822, 1999 Ohio App. LEXIS 2890

(June 25, 1999); *Guerrero v. Guerrero*, 11th Dist. No. 90-T-4354, 1991 Ohio App. LEXIS 678 (Feb. 15, 1991).

See also 1 Restatement of the Law 2d, Contracts, Section 201 (1981); *LaConte Ent. v. Cuyahoga Cty.*, 145 Ohio App. 3d 806 (8th Dist.2001); *Welch v. Muir*, 4th Dist. No. 08CA32, 2009-Ohio-3575 (Kline, J., concurring).

CV 501.09 Modification of contract *[Rev. 4/17/21]*

COMMENT

The Committee believes that the appropriate burden of proof for contract modification is a preponderance of the evidence, as there is no reason to require a greater burden of proof to establish a contract modification than to establish an original contract. *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190 (1936); *Cleveland Metal Bed Co. v. Kutz*, 27 Ohio App. 245 (8th Dist.1928); *Coldwell Banker Residential Real Estate Servs. v. Sophista Homes, Inc.*, 2nd Dist. Montgomery No. CA-13191, 1992 Ohio App. LEXIS 5474 (Oct. 26, 1992). *But see Ludwig v. Lydick*, 7th Dist. Monroe No. MO9, 2011-Ohio-5164; *Russell v. Daniels-Head & Assoc., Inc.*, 4th Dist. Scioto No. 1600, 1987 Ohio App. LEXIS 7970 (June 30, 1987) (requiring clear and convincing evidence).

1. GENERAL. The terms of a contract may be (modified) (changed) upon the mutual agreement of the parties and may occur (through words or conduct) (expressly or by implication). The (plaintiff) (defendant) claims that the parties modified their contract in the following way (*describe alleged modification*). The (plaintiff) (defendant) must prove by the greater weight of the evidence that the parties agreed to modify their contract.

COMMENT

No consideration is necessary to modify a contract for the sale of goods. R.C. 1302.12(A) (U.C.C. 2-209). *See also* OJI-CV 505.09. Consideration is required to modify other contracts. *Trader v. People Working Cooperatively*, 104 Ohio App.3d 690 (1st Dist.1994); *Richland Builders v. Thome*, 88 Ohio App. 520 (3rd Dist.1950); *Synergy Mech. Constrs. v. Kirk Williams Co.*, 10th Dist. Franklin No. 98AP-431 (Dec. 22, 1998). However, a modification without consideration will be enforced if a party relies on the modification and a refusal to enforce the modification would result in fraud or injury to the promisee. *Mehurin v. Stone*, 37 Ohio St. 49 (1881); *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163 (1st Dist.1990); *J. Richard Indus., LP v. Stanley Machining Inc.*, 6th Dist. No. L-03-1024, 2004-Ohio-3804. *See also* OJI-CV 501.31.

2. EXPRESS AND IMPLIED CONTRACTS. OJI-CV 501.03 § 3.

CV 501.11 Affirmative defense: mutual mistake of fact *[Rev. 4/17/21]*

COMMENT

Mutual mistake of fact, and numerous other doctrines such as unilateral mistake, impossibility, and frustration of purpose, are usually denominated as excuses rather than as affirmative defenses. Like affirmative defenses, however, the party seeking to resist the enforcement of the contract has the burden of proof of establishing the excuse. For simplicity's sake, all such defenses are described as affirmative defenses pursuant to Civ. R. 8(C).

1. GENERAL. OJI-CV 303.03 § 4.

COMMENT

In the case of a release of liability, e.g., the settlement of a personal injury claim, mutual mistake must be proved by clear and convincing evidence. *Sloan v. Standard Oil Co.*, 177 Ohio St. 149 (1964). The same standard of proof is applicable to the reformation of a written instrument or deed. *Mason v. Swartz*, 76 Ohio App.3d 43 (6th Dist.1991). However, the vast majority of Ohio mistake cases deal with reformation, and the standard of proof in other cases of mutual mistake of fact is not clear. Ohio courts of appeal cases indicate, generally without discussion, that the standard for mutual mistake is clear and convincing evidence. *See Coldwell v. Moore*, 7th Dist. No. 13 CO 27, 2014-Ohio-5323; *Lusardo v. Broadview Savings & Loan Co.*, 8th Dist. No. 58147, 1991 Ohio App. LEXIS 1073 (Mar. 14, 1991); *Patel v. Larkin*, 5th Dist. No. 1999 AP 01 0005, 1999 Ohio App. LEXIS 6442 (Dec. 28, 1999); *Small v. Ritchey*, 9th Dist. No. 12119, 1985 Ohio App. LEXIS 9224 (Nov. 6, 1985). The Supreme Court of Ohio has not definitively ruled on the issue and most jurisdictions outside Ohio apply a preponderance of the evidence standard in cases not involving a release of liability or the reformation of a written instrument.

2. DEFENDANT'S CLAIM—MUTUAL MISTAKE OF FACT. The defendant claims that he/she/it is excused from performing the contract because of a mutual mistake of fact. Before you may find for the defendant, you must find by clear and convincing evidence that

(A) both parties were mistaken as to a fact that is material to the contract; and

(B) the defendant was not negligent in failing to discover the mistake.

However, if you further find that the plaintiff proved by the greater weight of the evidence that the defendant was aware at the time the contract was made that he/she/it had only limited knowledge with respect to the facts to which the mistake relates and treated his/her/its limited knowledge as sufficient, you must then find that the defendant has failed to establish the affirmative defense of mutual mistake of fact and is not excused from performing the contract.

COMMENT

Drawn from *Reilley v. Richards*, 69 Ohio St.3d 352 (1994), and 1 Restatement of the Law 2d, Contracts, Sections 152 and 154 (1981). *See J.A. Indus. v. All Am. Plastics, Inc.*, 133 Ohio App.3d 76 (3rd Dist.1999).

CV 501.13 Affirmative defense: unilateral mistake of fact *[Rev. 4/17/21]*

COMMENT

The Supreme Court of Ohio has not fully addressed the requirements necessary for excuse based on unilateral mistake of fact, although a dissent in a Supreme Court of Ohio case assumed the applicability of the criteria in 1 Restatement of the Law 2d, Contracts, Sections 153 and 154 (1981). *See Rulli v. Fan Co.*, 79 Ohio St.3d 374 (1997) (Cook, J., dissenting). Numerous Ohio appellate cases, however, have applied the criteria of the Restatement in deciding whether a party can get relief for a unilateral mistake of fact. *See Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7; *General Tire, Inc. v. Mehlfledt*, 9th Dist. Summit No. 19269, 1999 Ohio App. LEXIS 2970 (June 23, 1999); *Zimmerman v. U.S. Diamond & Gold Jewelers, Inc.*, 2nd Dist. Montgomery No. 14680, 1995 Ohio App. LEXIS 901 (Mar. 8, 1995). Because the Supreme Court of Ohio has regularly adopted the Restatement in other areas of contract law, and courts of appeal have consistently applied the Restatement criteria, the Committee believes that the appropriate standards for unilateral mistake of fact are those contained in the Restatement.

The Ohio cases are unclear as to when a party's own negligence will prevent that party from relying on the excuse of unilateral mistake of fact. A substantial number of cases state without qualification that a party's own negligence will prevent unilateral mistake from being an excuse. *See Convenient Food Mart, Inc. v. CON., Inc.*, 11th Dist. Lake No. 95-L-093, 1996 Ohio App. LEXIS 4338 (Sept. 30, 1996); *Carucci v. John Hancock Mut. Life Ins. Co.*, 15 Ohio App.2d 1 (1st Dist.1968). Other cases have adopted the position that a mistaken party's negligence can, but will not necessarily, bar relief. *See General Tire, Inc. v. Mehlfeldt, supra*; *Liezert v. Liezert*, 9th Dist. Summit No. 15031, 1991 Ohio App. LEXIS 4717 (Oct. 2, 1991); *Green Local Teachers Ass'n. v. Blevins*, 43 Ohio App.3d 71 (4th Dist.1987); *Bank of America, N.A. v. Seymour*, 10th Dist. Franklin No. 18AP-272, 2019-Ohio-2884. Because the Supreme Court of Ohio in *Reilley v. Richards*, 69 Ohio St.3d 352 (1994), stated in the context of mutual mistake that the negligence of a mistaken party will bar relief, the Committee believes that in cases of unilateral mistake, negligence will bar relief.

The standard of proof necessary for prevailing on the affirmative defense of unilateral mistake of fact is not entirely clear. Where the mistake that is asserted is that a writing does not reflect the true agreement of the parties (rescission or reformation), the proper standard is clear and convincing evidence *See, e.g., General Tire, Inc. v. Mehlfeldt, supra*; Comment to OJI-CV 501.13. Where the mistake of fact involves something other than a mistaken writing, the Committee

believes that the appropriate standard is the greater weight of the evidence.

This instruction is drafted with the assumption that rescission or excuse is the remedy sought. Because reformation of a written instrument is equitable in nature, whether reformation of a writing is appropriate in unilateral mistake cases is a decision for the court. *See e.g., Nat'l City Real Estate Servs., LLC v. Frazier*, 4th Dist. Ross No. 17CA3585, 2018-Ohio-982; *Miller v. Cloud*, 7th Dist. Columbiana No. 15 CO 0018, 2016-Ohio-5390. However, Ohio courts generally apply the Restatement criteria in determining whether reformation is merited on the basis of unilateral mistake. *See, e.g., L.B. Trucking Co., Inc. v. C.J. Mahan Constr. Co.*, 10th Dist. Franklin No. 01AP-1240, 2002-Ohio-4394; *425 Beecher, LLC v. Unizan Bank, Natl. Assn.*, 186 Ohio App.3d 214, 2010-Ohio-412 (10th Dist.).

Ohio cases hold that the parole evidence rule does not bar extrinsic evidence of unilateral mistake even when an integration clause is present. *Faivre v. DEX Corp., Northeast*, 182 Ohio App. 3d 563, 2009-Ohio-2660 (10th Dist.). *See also Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7.

1. GENERAL. OJI-CV 303.03 § 4.

2. DEFENDANT'S CLAIM—UNILATERAL MISTAKE OF FACT. The defendant claims that he/she/it is excused from performing the contract because of a unilateral mistake of fact. Before you may find for the defendant, you must find by the greater weight of the evidence that

(A) the defendant was mistaken as to a fact that is material to the contract; and

(B) the defendant was not negligent in failing to discover the mistake; and

COMMENT

Drawn from *Reilley v. Richards*, 69 Ohio St.3d 352 (1994) and 1 Restatement of the Law 2d, Contracts, Sections 153 and 154 (1981). *See J.A. Indus. v. All Am. Plastics, Inc.*, 133 Ohio App.3d 76 (3rd Dist.1999).

(C) the plaintiff knew or had reason to know of the defendant's mistake or negligently caused the mistake.

COMMENT

Section 153 of 1 Restatement of the Law 2d, Contracts (1981) has, as an alternative to the plaintiff's knowledge or reason to know of the mistake, that the effect of enforcing the contract would be unconscionable. Whether the plaintiff had reason to know of the mistake is clearly a question of fact. It is not clear under the Restatement, however, whether the issue of unconscionability is an issue for the judge or jury, and no Ohio case has addressed this issue. Generally, however, the issue of unconscionability is to be decided by the judge. *See* Restatement of the Law 2d, Contracts, Section 208 (1981); R.C. 1302.15 (Uniform Commercial Code,

Section 2-302). Consequently, the Committee has omitted any reference to this alternative from the instruction. In cases in which the unconscionability of enforcing the contract is at issue, an interrogatory should be drafted to require the jury to reach separate findings on each of the elements of unilateral mistake. If the jury finds that the other elements of unilateral mistake are present but does not find that the plaintiff knew or should have known of the mistake, the judge must determine whether enforcement against the mistaken party would be unconscionable.

Nevertheless, if the plaintiff proved by the greater weight of the evidence that the defendant was aware at the time the contract was made that he/she/it had only limited knowledge with respect to the facts to which the mistake relates and treated his/her/its limited knowledge as sufficient, you must find that the defendant has failed to establish the affirmative defense of unilateral mistake of fact.

3. MATERIAL. A mistake is material to a contract when it is a mistake as to a basic assumption on which the contract was made and that has a substantial effect on the agreed exchange of performances.

COMMENT

Drawn from *Reilley v. Richards*, 69 Ohio St.3d 352 (1994), 1 Restatement of the Law 2d, Contracts, Section 152(1) (1981).

4. NEGLIGENT/NEGLIGENTLY. "Negligence" means the failure to use ordinary care. "Ordinary care" is the care that a reasonably careful person would use under the same or similar circumstances.

COMMENT

Drawn from OJI-CV 401.01.

5. CAUSED. "Caused" means an act or failure, which in the natural and continuous sequence, directly produced the mistake and without which the mistake would not have occurred. The mistake must have been the natural and foreseeable result of the plaintiff's negligence. The test for foreseeability is whether under the circumstances in evidence a reasonably careful person would have anticipated the defendant's mistake.

COMMENT

Drawn from OJI-CV Chapter 405 and OJI-CV 401.07.

CV 501.15 Affirmative defense: frustration of purpose *[Rev. 4/17/21]*

COMMENT

The difference between the defense of frustration of purpose and the defense of impracticability is that frustration of purpose, unlike impracticability, does not impair the ability of the parties to perform. Rather, it makes performance of one of the parties virtually worthless to the other party.

Few Ohio cases have addressed the excuse of frustration of purpose, and it has never been addressed by the Ohio Supreme Court. A number of courts have said in dicta that frustration of purpose is not widely accepted in Ohio, although they generally have gone on to consider the doctrine. *See, e.g., Wells v. C.J. Mahan Constr. Co.*, 10th Dist. Franklin No. 05AP-180 and 05AP-183, 2006-Ohio-1831; *Am. Premium Underwriters v. Marathon Pipeline Co.*, 3rd Dist. Mercer No. 10-2001-08, 2002-Ohio-1299; *Printing Indus., Assoc. v. International Printing & Graphic Communications Union Local No. 56*, 584 F. Supp. 990 (N.D.Ohio 1984). However, the extant case law appears to establish that such a defense exists in Ohio. *See Wilharm v. M.J. Constr. Co.*, 118 Ohio App.3d 531 (8th Dist.1997); *America's Floor Source, LLC v. Joshua Homes*, 191 Ohio App.3d 493, 2010-Ohio-6296 (10th Dist.); *Donald Harris Law Firm v. Dwight-Killian*, 166 Ohio App.3d 786, 2006-Ohio-2347 (6th Dist.); *Mahoning Nat'l. Bank of Youngtown v. State*, 10th Dist. Franklin No. 75AP-532, 1976 Ohio App. LEXIS 6413 (May 27, 1976). Cases which discuss the doctrine generally rely on the Restatement of Contracts to provide the elements of the defense. *See also Bozeman v. Fitzmaurice*, 107 N.E.2d 627, 62 Ohio Law Abs. 526 (8th Dist.1951) (permitting excuse when union's purpose was unexpectedly frustrated). Further, Ohio has clearly adopted the defense of impracticability, which is doctrinally very similar to frustration of purpose. In the absence of guidance by Ohio courts to the contrary, this instruction is based upon the 1 Restatement of the Law 2d, Contracts, Section 265 (1981).

The leading case on frustration of purpose is *Krell v. Henry*, 2 K.B. 740 (1903), where the plaintiff leased two rooms to watch the coronation of King Edward VII, which was cancelled shortly before the scheduled time as a result of the King's illness.

1. GENERAL. OJI-CV 303.03 § 4.

2. DEFENDANT'S CLAIM—FRUSTRATION OF PURPOSE. The defendant claims that he/she/it is excused from performing the contract because the purpose of the contract was frustrated by (*describe frustrating event*). If you find by the greater weight of the evidence that

(A) the defendant's (principal)(primary) purpose for making the contract was frustrated by (*describe frustrating event*); and

(B) the frustration is substantial; and

(C) it was a basic assumption of the parties at the time they entered into the contract that (*describe frustrating event*) would not occur; and

(D) the frustration of purpose was not the fault of the defendant.

you will find that the defendant is excused from performing the contract.

3. PRINCIPAL PURPOSE. The "principal purpose" of the contract must be the basis of the contract such that without it the contract makes little sense.

COMMENT

See 1 Restatement of the Law 2d, Contracts, Section 265, Comment a (1981).

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe frustrating event*) would not occur, you should take into account the extent to which the event was foreseeable and all other facts and circumstances in evidence.

COMMENT

See 1 Restatement of the Law 2d, Contracts, Section 265, Comment a (1981). Foreseeability is specifically mentioned in the instruction for two reasons: (1) it is generally the most significant factor in deciding whether frustration of purpose exists, and (2) to advise the jury that they can find frustration of purpose even if the event was foreseeable.

CV 501.17 Affirmative defense: impracticability *[Rev. 4/17/21]*

COMMENT

Modern contract law has incorporated the doctrine of impossibility of performance into the broader concept of impracticability of performance. Early law required that performance be literally impossible for an excuse to be available. Modern law only requires that performance be impracticable, which necessarily includes impossibility. *See* 1 Restatement of the Law 2d, Contracts, Chapter 11, Reporter's Notes (1981).

1. GENERAL. OJI-CV 303.03 § 4.

2. IMPRACTICABILITY OF PERFORMANCE. The defendant claims that he/she/it is excused from performing the contract because the defendant's performance has become impracticable as a result of (*describe event*). If all of the requirements for impracticability are proved, then the defendant is excused from performing the contract. Before you may find impracticability of performance, you must find by the greater weight of the evidence that

(A) performance of the contract by the defendant has become impracticable because of (*describe event*); and

(B) it was a basic assumption of the parties at the time they entered into the contract that (*describe event*) would not occur; and

(C) the impracticability of performance was not the fault of the defendant.

3. IMPRACTICABILITY. "Impracticability" means that the contract could not be performed by the defendant, or could only be performed by the defendant with extreme and unreasonable difficulty, expense, or risk of injury. The mere fact that performance became more difficult or expensive than the defendant originally anticipated does not justify a finding that performance was impracticable.

COMMENT

See Transatlantic Finance Corp. v. United States, 363 F.2d 312 (D.C.Cir 1966); 1 Restatement of the Law 2d, Contracts, Section 261, Comment a (1981). *See also State ex rel. Jewett v. Sayre*, 91 Ohio St. 85 (1914).

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe event*) would not occur, you should take into account the extent to which the event was foreseeable and all other facts and circumstances in evidence.

COMMENT

See 1 Restatement of the Law 2d, Contracts, Section 261, Comment a (1981). Foreseeability is specifically mentioned in the instruction for two reasons: (1) it is generally the most significant factor in deciding whether impracticability exists, and (2) to advise the jury that they can find impracticability even if the event was foreseeable.

CV 501.19 Affirmative defense: impracticability due to government action *[Rev. 4/17/21]*

COMMENT

Modern contract law has incorporated the doctrine of impossibility of performance into the broader concept of impracticability of performance. Early law required that performance be literally impossible for an excuse to be available. Modern law only requires that performance be impracticable, which necessarily includes impossibility.

1. GENERAL. OJI-CV 303.03 § 4.

2. IMPRACTICABILITY DUE TO GOVERNMENT ACTION. The defendant claims that he/she/it is excused from performing the contract because his/her/its performance has become impracticable as a result of (*describe government action*).

Before you may find the defendant, you must find by the greater weight of the evidence that

(A) it has become impracticable for the defendant to legally perform his/her/its contract because of (*describe government action*); and

(B) it was a basic assumption of the parties at the time they entered into the contract that (*describe government action*) would not occur.

COMMENT

See Glickman v. Coakley, 22 Ohio App.3d 49 (8th Dist.1984); *Truetried Service Co. v. Hager*, 118 Ohio App.3d 78 (8th Dist.1997); *Bank One, Marion v. Marion, Ohio, Internal Medicine, Inc.*, 3rd Dist. Marion No. 9-96-69, 1997 Ohio App. LEXIS 1601 (Mar. 31, 1997).

This instruction does not include the requirement in OJI-CV 501.17 that the impracticability of performance not be the fault of the defendant. Because the supervening event in the present instruction is an action of the government, the defendant will almost never have caused the event that made his performance impracticable. Should this occur, however, the trial judge can draft an appropriate instruction based upon OJI-CV 501.17.

3. IMPRACTICABILITY. "Impracticability" means that the contract could not be performed by the defendant, or could only be performed by the defendant with extreme and unreasonable difficulty, expense, or risk of injury. The mere fact that performance became more difficult or expensive than the defendant originally anticipated does not justify a finding that performance was impracticable.

COMMENT

See Transatlantic Finance Corp. v. United States, 363 F.2d 312 (D.C.Cir.1966); 1 Restatement of the Law 2d, Contracts, Section 261, Comment a (1981). *See also State ex rel. Jewett v. Sayre*, 91 Ohio St. 85 (1914).

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe government action*) would not occur, you should take into account the extent to which the government action was foreseeable and all other facts and circumstances in evidence.

COMMENT

Some cases dealing with impracticability resulting from government action seem to make unforeseeability a prerequisite for recovery. *See Truetried Service Co. v. Hager*, 118 Ohio App.3d 78 (8th Dist.1997); *Bank One, Marion v. Marion, Ohio, Internal Medicine, Inc.*, 3rd Dist. Marion No. 9-96-69, 1997 Ohio App. LEXIS

1601 (Mar. 31, 1997). However, the case of *Glickman v. Coakley*, 22 Ohio App.3d 49 (8th Dist.1984), cites the 1 Restatement of the Law 2d, Contracts, Section 264 (1981), which does not make unforeseeability a necessary prerequisite for excuse. *See also Transatlantic Financing Corp v. United States*, 363 F.2d 312 (D.C. Cir.1966). In addition, the Uniform Commercial Code does not require that an event be unforeseeable in order to give rise to an excuse. *See* R.C. 1302.73 (UCC, Section 2-615) and Official Comments thereto. Although foreseeability is clearly a very important factor in determining whether the non-occurrence of the government action was a basic assumption of the contract, the Committee believes that the Ohio Supreme Court would rely upon the 1 Restatement of the Law 2d, Contracts (1981), and the Uniform Commercial Code and would not make unforeseeability a specific prerequisite for excuse.

CV 501.21 Affirmative defense: prevention of performance *[Rev. 4/17/21]*

1. GENERAL. OJI-CV 303.03 § 4.

2. DEFENDANT'S CLAIM—PREVENTION OF PERFORMANCE. The defendant claims that he/she/it is excused from his/her/its failure to perform under the contract because the plaintiff prevented him/her/it from (performing his/her/its promise) ([fulfilling] [completing] a condition that would have excused the defendant from performing). You will find for the defendant if you find by the greater weight of the evidence that

(A) the plaintiff, (without justification) (in bad faith), prevented the defendant from (performing his/her/its promise(s) under the contract) ([fulfilling] [completing] *describe condition*); and

(B) the defendant would have (performed the contract) ([fulfilled] [completed] *describe condition*) but for the plaintiff's action(s).

COMMENT

Werner v. Biederman, 64 Ohio App. 423 (1st Dist.1940); *Allied Erecting and Dismantling Co., Inc. v. Anderson Equip. Co.*, 7th Dist. Mahoning No. 99 CA 79, 2000-Ohio-2563. Some Ohio cases suggest a requirement of bad faith by the plaintiff in preventing performance is necessary to invoke the excuse by the defendant. *See Werner v. Biederman, supra.* However, other cases invoking the doctrine do not appear to require bad faith, only that the prevention not be justified. *See, e.g., Campbell v. Marple*, 4th Dist. Highland No. 00CA0013, 2000 Ohio App. LEXIS 5388 (Nov. 13, 2000); *Com-Corp. Indus. v. H&H Mach. Tool Co. of Iowa*, 8th Dist. Cuyahoga No. 69318, 1996 Ohio App. LEXIS 4795 (Oct. 31, 1996). Upon reviewing the cases, the court in *Go Travel Toledo, Inc. v. Am. Airlines*, 96 Fed. Appx. 290 (6th Cir.2004), held that the Ohio cases did not impose a requirement of bad faith on the plaintiff before an excuse based on prevention of performance was justified. The 1 Restatement of the Law 2d, Contracts, Section 245, Comment a (1981), states that if the lack of cooperation is justifiable, there is no excuse. It also mentions, however, that the obligation of good faith might impose some duties to not to interfere with performance. The Ohio Supreme Court has not resolved this

issue and the instruction has been drafted to provide alternatives to the judge.

The defendant is not relieved from liability if under the terms of the contract, the defendant assumed the risk of the prevention. In most cases, this will be an issue of law for the trial judge. However, if the result turns on the interpretation of a contract that contains ambiguous language, an appropriate instruction can be crafted using OJI-CV 501.07.

CV 501.23 Affirmative defense: payment (satisfaction) ***[Rev. 4/17/21]***

1. GENERAL. OJI-CV 303.03 § 4.

2. DEFENDANT'S CLAIM—PAYMENT (SATISFACTION). The defendant claims that the plaintiff cannot recover damages for breach of contract because the defendant has (paid) (given) (provided) the plaintiff all that was due under the contract. If you find by the greater weight of the evidence that the defendant has (made all payments required under the contract) (fully performed everything required under the contract), then you will find for the defendant.

COMMENT

Although Ohio courts describe the defense as "payment," the defense includes the performance of other obligations as well. While the plaintiff has the burden of proof of establishing a breach by the defendant, under Civ. R. 8(C) and Ohio case law, payment is an affirmative defense that must be pleaded and proved by the defendant. *Zimmerman v. Eagle Mortgage Co.*, 110 Ohio App.3d 762 (2nd Dist.1996); *Blackwell v. International Union, UAW Local No. 1250*, 21 Ohio App.3d 110 (8th Dist.1984); *In re Estate of Buckingham*, 9 Ohio App.2d 305 (2nd Dist.1967); *Ertel v. Hollingsworth*, 12th Dist. Preble No. CA84-03-012, 1984 Ohio App. LEXIS 11546 (Nov. 19, 1984).

CV 501.25 Affirmative defense: accord and satisfaction ***[Rev. 4/17/21]***

1. GENERAL. OJI-CV 303.03 § 4.

2. DEFENDANT'S CLAIM—ACCORD AND SATISFACTION. The defendant claims that there has been an accord and satisfaction and therefore he/she/it is not responsible for the breach of contract claimed by plaintiff. If you find by the greater weight of the evidence that the parties entered into an accord and satisfaction, you will find for the defendant.

3. ACCORD AND SATISFACTION. An "accord" occurs when there is a contract between two parties in which one party agrees to accept a substitute performance in satisfaction of the performance that is due under a contract. "Satisfaction" takes place when the substitute performance occurs.

COMMENT

Drawn from *Allen v. R.G. Indus. Supply*, 66 Ohio St. 3d 229 (1993), *superseded*

on other grounds, R.C. 1303.40(A); *Bank of Am., N.A. v. Levy*, 6th Dist. Lucas No. L-13-1082, 2015-Ohio-800.

4. ELEMENTS. To find an accord and satisfaction, you must find by the greater weight of the evidence that

(*Use appropriate alternative*)

(A)(1) the parties agreed to a contract of accord in which the plaintiff agreed to accept performance from the defendant that was not required under an existing contract in substitution for performance required under the existing contract.

(*or*)

(A)(2) the plaintiff agreed to accept a sum in satisfaction of a bona fide dispute over an amount that the plaintiff claims was owed by the defendant.

(*and*)

(B) the (substitute performance occurred) (the sum was accepted by the plaintiff).

COMMENT

Drawn from *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 1993-Ohio-43, *superseded on other grounds*, R.C. 1303.40(A).

For instructions on contract formation generally, *see* OJI-CV 501.03 § 2.

Two alternatives are offered because a contract of accord, like all contracts, requires consideration in order to be enforceable. This consideration may be in the form of a performance not required under the original contract. However, consideration is not present when a creditor agrees to accept a lesser sum in satisfaction of a greater sum that is due, unless the amount due is subject to a bona fide dispute. The great majority of accord and satisfaction cases arise upon the payment of a lesser sum by a debtor than the sum the creditor asserts is due. When there is a bona fide dispute, the creditor's acceptance of the lesser sum is consideration for the accord.

5. AGREEMENT—PAYMENT BY CHECK OR OTHER INSTRUMENT (ADDITIONAL). In order to find a contract of accord by acceptance of a (check)(*describe other instrument*), you must find by the greater weight of the evidence that

(A) the (check) (*describe other instrument*) was offered in good faith; and

(B) the (check) (*describe other instrument*) (contained)(was accompanied by) a statement to the effect that it was offered in full satisfaction of a claim; and

(C) the claim was subject to a bona fide dispute; and

(D) that the (check)(*describe other instrument*) was (cashed)(negotiated).

COMMENT

The majority of accord and satisfaction cases involve payment by check that is

asserted to be offered in full satisfaction of an existing obligation, which is now largely governed by the Uniform Commercial Code. R.C. 1303.40(A), U.C.C. 3-311; R.C. 1301.308(B); U.C.C. 1-308. This legislation adopts the common law requirements for an accord and satisfaction with only a few small variations. *See* Official Comment 2 to R.C. 1303.40.

Where a check is offered as an accord, the fact that the creditor writes "accepted under protest," "with reservations of rights," or similar language does not prevent the check from acting as an accord so long as the debtor has provided notice that the check is offered as an accord. If the check or instrument contains such language, the judge should draft an appropriate instruction informing the jury that this language has no effect.

R.C. 1303.40(A) requires that an instrument be tendered in "good faith" as an accord and satisfaction. The Committee believes that the issue of good faith is a question of fact for the jury. *Thomas v. Am. Elec. Power Co.*, 10th Dist. Franklin No. 03AP-1192, 2005-Ohio-1958; *Cole v. Puritan Life Ins. Co.*, 1st Dist. Hamilton No. C-75024, 1976 Ohio App. LEXIS 7224 (Feb. 2, 1976); *Sims Buick-GMC Truck, Inc. v. General Motors LLC*, N.D.Ohio No. 4:14 CV 2238, 2016 U.S. Dist. LEXIS 200521 (June 28, 2016); *see also Casserlie v. Shell Oil Co.*, 121 Ohio St. 3d 55, 2009-Ohio-3 (Pfeifer, J., dissenting).

The instrument must also contain "a conspicuous statement that the instrument was tendered in full satisfaction of the claim." Whether a statement is conspicuous is defined by R.C. 1301.201(B)(10) as "with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." Whether a term is "conspicuous" is for decision by the court. R.C. 1301.201(B)(10).

6. GOOD FAITH. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

COMMENT

R.C. 1303.01(A)(6).

7. BONA FIDE DISPUTE (ADDITIONAL). In order for there to be a bona fide dispute, there must be an honest and good faith disagreement over the amount owed by the defendant to the plaintiff under an existing contract.

COMMENT

Drawn from *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 1993-Ohio-43, *superseded on other grounds*, R.C. 1303.40(A).

CV 501.27 Affirmative defense: waiver *[Rev. 4/17/21]*

COMMENT

The Committee believes that the appropriate burden of proof for waiver is a preponderance of the evidence. *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190 (1936). The *White* case states that a waiver must be proved by a preponderance of the evidence, but the party asserting the waiver must show a clear, unequivocal, and decisive act. *But see, e.g., Seneca Valley, Inc. v. Village of Caldwell*, 156 Ohio App.3d 628, 2004-Ohio-1730 (7th Dist.) (requiring clear and convincing evidence for a waiver).

1. GENERAL.

OJI-CV 303.03 § 4.

2. WAIVER. The (plaintiff) (defendant) claims that the (plaintiff) (defendant) waived the ([plaintiff's] [defendant's] obligation to (*describe contractual obligation*)) (condition that (*describe condition*)). A waiver is the voluntary relinquishment of a known right. If all the requirements of waiver are proved, then the party claiming waiver is (relieved of his/her/its obligation to (*describe contractual obligation*)) (excused from (*describe condition*)). "Waiver" occurs when

(A) the (plaintiff) (defendant) voluntarily relinquished his/her/its right to (*describe other party's obligation*) (*describe condition*) by (*describe facts asserted to constitute a waiver*); and

(B) the (plaintiff) (defendant) was aware of the (right to (*describe other party's obligation*)) (condition) at the time of the waiver; and

(C) the (plaintiff) (defendant) intended to waive the (right to (*describe other party's obligation*)) (condition) at the time of the waiver; and

(D) the (plaintiff) (defendant) had full knowledge of the relevant facts at the time of the waiver; and

(E) (ADDITIONAL) the (plaintiff) (defendant) reasonably changed his/her/its position in a substantial way in reliance upon the waiver; and

COMMENT

The final element is only necessary if the waiver is not supported by consideration and the waiver also constitutes the discharge of a duty of performance required under the contract. *See Marfield v. The Cincinnati, D. & T. Traction Co.*, 111 Ohio St. 139 (1924); *Wells Fargo Bank, N.A. v. Baldwin*, 12th Dist. Butler No. CA2011-12-227, 2012-Ohio-3424; *Ayres v. Burnett*, 2nd Dist. Clark No. 2013-CA-88, 2014-Ohio-4404. The Ohio courts cited immediately above, and others, have adopted the pre-existing duty rule. Thus, if the asserted "waiver" constitutes the modification of the contract such that one party agrees to do no more than he/she/it

is already required to perform under a contract in exchange for a modification by the other party, there is no consideration and, according to these courts, the modification is not enforceable in the absence of reliance. For example, if a lessor agrees to accept a lesser rent in exchange for a promise to pay the lesser rent, the agreement, while it might be described as a "waiver" of the additional rent due, is a modification of the duty of performance due under the original contract and must be supported by consideration or reliance. However, the waiver of a condition, as opposed to the waiver of a required performance, does not have to be supported by consideration or reliance. For example, a buyer in a contract to buy real estate can waive a financing condition to his duty to purchase without receiving additional consideration or the other party showing reliance on the waiver.

The pre-existing duty rule has been losing force in contract law for some time. The 1 Restatement of the Law 2d, Contracts, Section 275 (1981), largely abolishes the rule, allowing a party who has not yet completed his own performance to discharge, in whole or part, the performance of the other party without consideration. Ohio courts have not yet adopted this provision of the Restatement of Contracts but Ohio courts have generally been receptive to principles enunciated in the Restatement. In addition, the Ohio Supreme Court has never expressly adopted the pre-existing duty rule. Finally, the *White* case cited above appears to apply a waiver doctrine to a case in which the pre-existing duty rule would seem to be applicable.

(F) the waiver was the result of a clear, unequivocal, and decisive act by the (plaintiff) (defendant).

COMMENT

The issue of waiver is a question of fact for the jury so long as there is evidence from which a waiver may legally be found. *State Automobile Mutual Ins. Ass'n v. Lind,* 122 Ohio St. 500 (1930).

Mere silence will not amount to a waiver where one is not bound to speak. Where silence is, under the circumstances, susceptible of more than one interpretation, a waiver will not be inferred therefrom. *Allenbaugh v. City of Canton*, 137 Ohio St. 128 (1940).

CV 501.29 Affirmative defense: duress *[Rev. 4/17/21]*

COMMENT

Duress can constitute either physical compulsion or economic duress. In *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990), the Supreme Court of Ohio adopted the formulation for economic duress expressed in 1 Restatement of the Law 2d, Contracts, Section 176, Comment a (1981). According to *Blodgett*, there are three elements to establish economic duress: (1) a wrongful/improper threat; (2) communicated by the other party to the contract; (3) that leaves the victim of the duress no reasonable alternative. *See Atlantic Veneer Corp. v. Robbins*, 4th Dist.

Pike No. 03CA719, 2004-Ohio-3710. The law of economic duress is a combination of law and fact—the issue of whether a threat is wrongful or improper is a question of law for the court, whereas the other two elements are questions of fact.

Merely taking advantage of another's financial difficulty is not economic duress. Instead, the person alleging financial difficulty must prove that the financial difficulty was contributed to or caused by the one accused of coercion. *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990).

According to 1 Restatement of the Law 2d, Contracts, Section 176 (1981), a threat is improper if (1) what is threatened is a crime or a tort; (2) what is threatened is criminal prosecution; (3) what is threatened is the use of civil process and the threat is made in bad faith; or (4) the threat is a breach of the duty of good faith and fair dealing. If the exchange resulting from the contract is not on fair terms, a threat is also improper if (1) the threatened act would harm the recipient and would not significantly benefit the party making the threat; (2) the effectiveness of the threat is significantly increased by prior unfair dealing; or (3) the threat is the use of power for illegitimate ends. *See First Nat'l Bank of Shelby v. Stump*, 3rd Dist. Crawford No. 3-95-22, 1996 Ohio App. LEXIS 539 (Feb. 14, 1996) (applying 1 Restatement of the Law 2d, Contracts, Section 176 (1981) to determine if the threat was improper). There is generally no improper threat if a party is legally entitled to take the threatened action. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103 (10th Dist.1992); *Patton v. Wood Cty Humane Soc.*, 154 Ohio App.3d 670, 2003-Ohio-5200 (6th Dist.).

1. GENERAL. The defendant claims that he/she/it is excused from performing the contract because he/she/it entered into the contract under duress.

(*Use appropriate alternative[s]*)

(A) PHYSICAL DURESS. Before you can find the defendant is excused from performing the contract, the defendant must prove by clear and convincing evidence that he/she/it was physically compelled to enter into the contract.

COMMENT

A contract entered into as a result of physical compulsion is void rather than voidable. It is immaterial that the duress is exercised by a party to the transaction or by a third person. *See* 1 Restatement of the Law 2d, Contracts, Section 174 and Section 175, Comment d (1981).

(or)

(B) ECONOMIC DURESS. Before you can find the defendant is excused from performing the contract, the defendant must prove by clear and convincing evidence that

(1) the defendant involuntarily accepted the terms of the plaintiff; and

(2) the circumstances permitted the defendant no other reasonable alterna-

tive; and

(3) the circumstances were a (proximate) (direct) result of the coercive acts of the plaintiff.

To avoid a contract on the basis of economic duress, the defendant must prove coercion by the plaintiff. It is not enough to show that the defendant assented merely because of difficult circumstances that are not the fault of the plaintiff.

COMMENT

Drawn from *Treasurer of Lucas Cty. v. Sheehan*, 6th Dist. Lucas No. L-18-1176, 2020-Ohio-3493 (6th Dist.). To be a proximate cause, the duress must substantially contribute to the defendant's decision to enter into the contract. *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990); *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision*, 75 Ohio St.3d 540, 1996-Ohio-175. 1 Restatement of the Law 2d, Contracts, Section 174 and Section 175, Comment c (1981).

2. NO REASONABLE ALTERNATIVE (ADDITIONAL). In deciding whether any reasonable alternative existed, you must take into account the practicality of the available alternative(s), including a legal remedy. The defendant cannot claim a defense of duress if he/she/it failed to take advantage of a reasonable alternative.

COMMENT

See 1 Restatement of the Law 2d, Contracts, Section 175, Comment b (1981).

This subsection will only be used with Economic Duress.

3. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

COMMENT

Lucarell v. Nationwide Mut. Ins. Co., 152 Ohio St.3d 453, 2018-Ohio-15.

CV 501.31 Promissory estoppel *[Rev. 4/17/21]*

COMMENT

Ohio courts have adopted Section 90 of the Restatement of the Law 2d, Contracts (1981). *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433 (1996); *McCroskey v. State*, 8 Ohio St.3d 29 (1983). There are four elements of promissory estoppel required by 1 Restatement, Section 90: (1) whether a promise was made; (2) whether reliance upon the promise occurred; (3) whether the reliance was reasonable; and (4) whether injustice can be avoided only by enforcement of the

promise. The first three elements are questions of fact for the jury. *See Wallace v. Gray Drug, Inc.*, 8th Dist. Cuyahoga No. 57031, 1990 Ohio App. LEXIS 3670 (Aug. 23, 1990); *Stahl v. Brush Wellman, Inc.*, 6th Dist. Ottawa No. OT-96-049, 1997 Ohio App. LEXIS 754 (Mar. 7, 1997). The Committee believes that whether injustice can be avoided only by enforcement of the promise is an issue of law for the judge. *See Moore v. Impact Cmty. Action*, Franklin C.P. No. 10 CV 11771, 2011 Ohio Misc. LEXIS 20689 (Oct. 25, 2011); *Hoffman v. Red Owl Stores, Inc.*, 26 Wisc.2d 683 (1965); *Faimon v. Winona State University*, 540 N.W.2d 879 (Minn. App.1995). *See also* R.C. 1302.15; UCC 2-302 (unconscionability is a question of law).

Some Ohio Court of Appeals cases require a clear and convincing standard to prove promissory estoppel. *Circuit Solutions, Inc. v. Mueller Elec. Co.*, 9th Dist. Lorain No. 05CA008775, 2006-Ohio-4321; *In re Estate of Popov*, 4th Dist. Lawrence No. 02CA26, 2003-Ohio-4556; *Hayes v. Brown*, 3rd Dist. Henry No. 7-89-9, 1990 Ohio App. LEXIS 5272 (Dec. 3, 1990). These cases rely on *Kroll v. Close*, 82 Ohio St. 190 (1910). However, in *Kroll*, the issue of the standard of proof was not discussed by the Court and the case did not deal with promissory estoppel; instead it dealt with estoppel in pais, an entirely different doctrine.

The majority of Ohio courts appear to require a preponderance of the evidence standard to prove promissory estoppel. In a number of cases they have done so explicitly. *See, e.g., Miller v. BancOhio Nat'l Bank*, 10th Dist. Franklin No. 90AP-380, 90AP-551, 1991 Ohio App. LEXIS 2051 (Apr. 23, 1991); *McCarthy, Lebit, Crystal & Haiman Co., LPA v. First Union Mgt., Inc.*, 87 Ohio App.3d 613 (8th Dist.1993); *Evets Electric v. Ohio Edison Co.*, 11th Dist. Trumbull No. 89-T-4289, 1991 Ohio App. LEXIS 6223 (Dec. 20, 1991). In many more cases, Ohio courts discuss the requirements of promissory estoppel in detail without indicating that a heightened standard of proof applies. The Committee believes a preponderance of the evidence is the appropriate standard.

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant is (prevented) (estopped) from denying a contract exists based upon promissory estoppel.

2. PROOF OF CLAIM. In order to find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant promised to the plaintiff that (*describe alleged promise*); and

(B) the defendant should reasonably have expected the plaintiff to rely on the promise by (*describe action or forbearance asserted by the plaintiff*); and

(C) the plaintiff did (*describe action or forbearance*) in reliance upon the promise.

COMMENT

See Ed Schory & Sons, Inc. v. Francis, 75 Ohio St.3d 433 (1996); *McCroskey v. State*, 8 Ohio St.3d 29 (1983); *Talley v. Teamsters Local No. 377*, 48 Ohio St.2d 142 (1976). A number of appellate decisions have rephrased section (B) above to require that the reliance of the plaintiff be reasonable and foreseeable. *See, e.g., Weiper v.*

W.A. Hill & Assocs., 104 Ohio App.3d 250 (1st Dist.1995); *Healey v. Republic Powdered Metals, Inc.*, 85 Ohio App.3d 281 (9th Dist.1992); *O.E. Meyer Co. v. The BOC Group, Inc.*, 6th Dist. Erie No. E-99-002, 2000 Ohio App. LEXIS 734 (Mar. 3, 2000). The Ohio Supreme Court, however, has explicitly adopted 1 Restatement of the Law 2d, Contracts, Section 90 (1981), which uses the language in the instruction. In the event the jury finds for the plaintiff on a claim of promissory estoppel, the court has the ability to award expectation, reliance, or restitution damages depending on the justice of the case. *Brown Deer Restaurant, Inc. v. New Mkt. Corp.*, 8th Dist. Cuyahoga No. 48910, 1985 Ohio App. LEXIS 7533 (Mar. 28, 1985); *Mers v. Dispatch Printing Co.*, 39 Ohio App.3d 99 (10th Dist.1988); *ZBS Indus., Inc. v. Anthony Cocca Videoland, Inc.*, 93 Ohio App.3d 101 (8th Dist.1994).

CV 501.33 Expectation damages *[Rev. 4/17/21]*

COMMENT

In cases involving the sale of goods, *see* OJI-CV 505.25 to OJI-CV 505.53 for instructions on buyer's and seller's remedies.

This section deals with the "expectation" measure of damages. It is the presumptive measure of damages for breach of contract and seeks to put the injured party in the same position as if the breaching party had performed the contract.

Generally, courts have not permitted a party to recover damages for emotional distress suffered as a result of a breach of contract. However, in *Kishmarton v. William Bailey Constr. Co.*, 93 Ohio St.3d 226, 2001-Ohio-1334 (2001), the Court adopted 1 Restatement of the Law 2d, Contracts, Section 353 (1981) and held that when a vendee's claim for breach of an implied duty to construct a house in a workmanlike manner is successful, emotional distress damages can be recovered where the breach causes bodily harm or the breach is of such a kind that serious emotional distress is a particularly likely result. For a definition of "serious emotional distress," *see* OJI-CV 429.07 § 3.

A number of subsequent federal court decisions have held that the recovery of emotional distress damages in Ohio is limited to the specific case of the failure to construct a residence in a workmanlike manner. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655 (6th Cir.2005); *EEOC v. Honda of Am., Mfg., Inc.*, S.D.Ohio No. 2:06-cv-00233, 2007 U.S. Dist. LEXIS 37584 (May 23, 2007).

Other courts, however, have read *Kishmarton* more broadly. *See, e.g., Clay v. Shriver Allison Courtley Co.*, 7th Dist. Mahoning No. 17 MA 0003, 2018-Ohio-3371 (allowing the recovery of emotional distress damages for breach of a funeral contract). Moreover, although stating that its holding would "not open the floodgates," the court in *Kishmarton* did not directly limit its holding to the failure to construct a residence in a workmanlike manner. Finally, 1 Restatement, Section 353, is not limited to such cases, but applies to any contract, the breach of which is likely to result in serious emotional distress.

When a breach of contract results in physical damage to real property or when, as a result of a breach, real property must be repaired, restored, or completed in

order to conform to a contract, the fundamental principle of section 1 of this instruction that damages should put the plaintiff in the same position as performance remains applicable.

When the property is noncommercial real estate, and the damage is temporary (can be repaired or restored) a plaintiff may be awarded the cost of repair, restoration, or completion that puts him in the same position as performance, even if it exceeds the diminution in market value, so long as the cost does not result in excessive compensation and is reasonable under the circumstances. *Martin v. Design Constr. Servs.*, 121 Ohio St.3d 66, 2009-Ohio-1.

If the property is commercial in nature and the damage is temporary, it is not clear whether the difference in market value between what the plaintiff was promised and what the plaintiff received, as set forth in *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238 (1923), will set the upper limit on damages.

A number of courts have held that the rule of the *Martin* case applies to both commercial and non-commercial property. *See, e.g., B&B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. Mahoning No. 12 MA 5, 2012-Ohio-5981; *Northpoint Props. v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512; *Monroe v. Steen*, 9th Dist. Summit No. 24342, 2009-Ohio-5163. While there may be good reason to distinguish between commercial and non-commercial property because commercial property rarely has value beyond its market value, and the Ohio Supreme Court has not yet ruled on the question, the weight of appellate authority indicates that courts will apply the rule of the *Martin* case to both commercial and non-commercial property.

In both commercial and non-commercial property cases, evidence of the diminution of the fair market value of the property caused by the damage may be considered in deciding the reasonableness of the cost of repairs. When evidence of market value is introduced, the court may need to draft appropriate additional instructions. *See* OJI-CV 315.35 § 3 for the definition of "fair market value."

An injured party, however, instead of seeking expectation damages, may elect to recover damages measured by his/her/its reliance interest, which seeks to put the injured party in the same position that he/she/it would have been in had the contract not been made. Also, the reliance interest may be protected by the court as an alternative measure of damages in other instances such as where the contract is formed by promissory estoppel or where expectation damages are unforeseeable or too speculative. *See* 1 Restatement of the Law 2d, Contracts, Section 90 (1981). For an instruction on the reliance damages, *see* OJI-CV 501.35.

In addition, a plaintiff has the right to disregard the contract and sue in restitution. *Cleveland Co. v. Standard Amusement Co.*, 103 Ohio St. 382 (1921). This measure is determined by the reasonable value of the benefit that the injured party has conveyed on the contract breacher. For an instruction on restitution damages, *see* OJI-CV 501.37. Restitution ("quantum meruit" or "unjust enrichment") may be recovered even in the absence of an enforceable contract if the necessary requirements are met. *See* OJI-CV 501.39.

1. GENERAL. If you find by the greater weight of the evidence that the defendant (breached) (broke) the contract (and was not excused because [*describe excuse asserted*

by the defendant]), the plaintiff is entitled to damages in the amount sufficient to place him/her/it in the same position in which he/she/it would have been if the contract had been fully performed by the defendant if the damages are reasonably certain and reasonably foreseeable.

2. REASONABLY CERTAIN. You may only award damages the existence and amount of which are reasonably certain and have been proved to you by the greater weight of the evidence. You may not award damages that are remote or speculative.

COMMENT

Drawn from *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177 (1990). The *AGF* case held that a "new" business is not prevented from recovering lost profits if they are established with reasonable certainty. The court said that "reasonable certainty" may be established through the use of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts.

3. REASONABLY FORESEEABLE/CONTEMPLATION OF THE PARTIES. You may only award those damages that were the natural and probable result of the breach of the contract or that were reasonably within the contemplation of the parties as the probable result of the (breach) (breaking) of the contract. This does not require that the defendant actually be aware of the damages that will result from the breach of contract so long as the damages were reasonably foreseeable at the time the parties entered into the contract as a probable result of the breach.

COMMENT

Drawn from *Midvale Coal Co. v. Cardox Corp.*, 152 Ohio St. 437 (1949) (overruled on other grounds in *Fischer Const. Co. v. Stroud*, 175 Ohio St. 31 (1963)); and 1 Restatement of the Law 2d, Contracts, Section 351 (1981).

4. CONTEMPLATION OF THE PARTIES—LOST PROFITS (ADDITIONAL). In order to award lost profits claimed by the plaintiff, you must find that profits were within the contemplation of the parties at the time the contract was made and that the loss of profits was the probable result of the (breach) (breaking) of the contract.

COMMENT

In cases dealing with lost profits, the Ohio Supreme Court has restated the general rule found in § 4 in the specific manner stated in this § 5. *See AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177 (1990); *City of Gahanna v. Eastgate Props.*, 36 Ohio St.3d 65 (1988); *Charles R. Combs Trucking, Inc. v. International Harvester, Co.*, 12 Ohio St.3d 241 (1984).

5. DAMAGES—LOST PROFITS (ADDITIONAL). Lost profits are calculated by deciding what the plaintiff was entitled to receive had the contract been performed. You should then add other damages, if any, suffered by the plaintiff as a result of the breach by the defendant. From this sum you should subtract the amount, if any, that the plaintiff saved by not having to fully perform the contract.

COMMENT

Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co., 151 Ohio St. 522 (1949). This instruction may be used to instruct the jury on the calculation of the expectation interest where the plaintiff is seeking recovery of lost profits.

6. DUTY TO MITIGATE. The defendant claims the plaintiff failed to mitigate his/her/its damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not (use reasonable diligence) (make reasonable efforts) under the facts and circumstances in evidence to (avoid loss) (decrease damages) caused by the defendant's breach of contract, you should not allow damages that could have been avoided by (the exercise of reasonable diligence) (reasonable efforts to avoid loss). The plaintiff, however, is not required to take measures that would involve undue risk, burden, or humiliation.

COMMENT

F. Enterprises, Inc. v. Kentucky Fried Chicken Corp., 47 Ohio St.2d 154 (1976); *Czarnecki v. Basta*, 112 Ohio App.3d 418 (8th Dist.1996); *Chandler v. General Motors Acceptance Corp.*, 68 Ohio App.2d 30 (1st Dist.1980).

7. LOSS BY FULL PERFORMANCE (ADDITIONAL). The defendant claims that the plaintiff would have lost more money by full performance of the contract than he/she/it lost by the defendant's (breach) (breaking) of the contract. If you find by the greater weight of the evidence that the plaintiff would have lost more money by full performance of the contract than he/she/it lost by the defendant's (breach) (breaking) of the contract, you must award the plaintiff no damages.

COMMENT

Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co., 151 Ohio St. 522 (1949); *Chaney v. Vanover*, 3d Dist. Auglaize No. 2-84-18, 1985 Ohio App. LEXIS 9545 (Nov. 21, 1985).

8. NOMINAL DAMAGES. If you find that the defendant has (breached) (broken) the contract with the plaintiff, and if you further find that the plaintiff has failed to prove

any damages calculated according to these instructions, you may award the plaintiff nominal damages."Nominal" means trifling or small. Nominal damages are generally $10 or less.

COMMENT

Drawn from *Lacey v. Laird*, 166 Ohio St. 12 (1956); *Stojkovic v. Avery & Thress, M.D., Inc.*, 1st Dist. Hamilton No. C-970279, 1999 Ohio App. LEXIS 2403 (May 28, 1999).

CV 501.35 Reliance damages *[Rev. 4/17/21]*

1. GENERAL. If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the amount of damages necessary to place him/her/it in the same position as if the contract had not been made. These damages include, but are not limited to, expenditures reasonably made in preparation for performance or in performance of the contract.

COMMENT

Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn., 10th Dist. Franklin No. 12AP-647, 2013-Ohio-3890. *See* 1 Restatement of the Law 2d, Contracts, Sections 344, 349 (1981).

2. LOSS BY FULL PERFORMANCE (ADDITIONAL). The defendant claims that the plaintiff would have lost money by full performance of the contract. If you find by the greater weight of the evidence and with reasonable certainty that the plaintiff would have lost money by full performance of the contract, you must reduce the plaintiff's damages by the amount of that loss.

COMMENT

Reliance damages must be reduced by any amount that the defendant can prove with reasonable certainty the plaintiff would have suffered had the contract been fully performed. *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. Franklin No. 12AP-647, 2013-Ohio-3890; 1 Restatement of the Law 2d, Contracts, Section 349.

CV 501.37 Rescission and restitution *[Rev. 4/17/21]*

1. GENERAL. If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the reasonable value of the (performance) (work) (services) (materials) furnished by the plaintiff to the defendant.

This value is not limited by the contract price and may be greater or less than the contract price.

COMMENT

It has long been true in Ohio that a plaintiff injured by a breach of contract has the option to "rescind" the contract and recover in restitution or "quantum meruit." *Cleveland Co. v. Standard Amusement Co.*, 103 Ohio St. 382 (1921); *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182 (1897). This instruction should only be used when the plaintiff has chosen to exercise that option.

2. LOSS BY FULL PERFORMANCE (ADDITIONAL). The defendant claims that the plaintiff would have lost more money by full performance of the contract than he/she/it lost by the defendant's (breach) (breaking) of the contract; that is, the plaintiff is in a better position because of the defendant's breach than if the contract had been fully performed. If you find by the greater weight of the evidence that the plaintiff would have lost more money by full performance of the contract than he/she/it lost by the defendant's (breach) (breaking) of the contract, you shall award the plaintiff no damages.

COMMENT

If the plaintiff chooses to rescind the contract and sue in restitution, the contract price which the plaintiff would have received upon full performance is irrelevant to the amount the plaintiff can recover in restitution. However, if the defendant can prove that the plaintiff would have lost more by performing the contract than he/she/it lost as a result of the defendant's breach, the plaintiff will not be permitted to recover in restitution. *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182 (1897); *D.H. Dave, Inc. v. Delia Plastering Co.*, 243 F.2d 732 (6th Cir.1957). However, this rule does not apply when quantum meruit recovery is sought for work done over and above that called for by the contract. *Cleveland Co. v. Standard Amusement Co.*, 103 Ohio St. 382 (1921).

CV 501.39 Quantum meruit: mistake/implied in fact contract *[Rev. 4/17/21]*

COMMENT

In order to recover for unjust enrichment/quantum meruit in Ohio, three elements must be proved: (1) there must have been a benefit conferred upon the defendant by the plaintiff; (2) the benefit must have been given with the knowledge of the defendant; and (3) retention of the benefit by the defendant would be unjust under the circumstances. *R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Comm'n*, 913 F. Supp. 1031 (N.D.Ohio 1996).

"[W]hether retention of the benefits by the defendant would be unjust under the

circumstances is a question of law." *Sterling Constr., Inc. v. Alkire*, Madison C.P. No. CVH2011-0196, 2013 Ohio Misc. LEXIS 8505 (Nov. 4, 2016), *rev'd on other grounds*, 12th Dist. Madison No. CA2013-08-028, CA2013-08-030, 2014-Ohio-2897; *Rezac Livestock Comm'n Co. v. Pinnacle Bank*, D.Kansas No. 15-4958-DDC, DDC, 2020 U.S. Dist. LEXIS 3373 (Jan. 9, 2020). Before this instruction is given, the judge must ensure that the plaintiff's evidence, if believed, satisfies this element.

Restitution is available in a wide variety of circumstances. This instruction is limited to those occasions where a benefit has been conferred on the defendant by mistake, or where the plaintiff is arguing that the parties have entered into an implied-in-fact contract. *See* Restatement of the Law 3d, Restitution and Unjust Enrichment, Part II (2011).

1. GENERAL. Plaintiff claims that he/she/it is entitled to recover the reasonable value of the (services he/she/it performed) (work, labor, and materials he/she/it provided) for the benefit of the defendant. Plaintiff may recover the reasonable value of (these services) (this work, labor, and materials) if you find by the greater weight of the evidence that

(A) the plaintiff (performed services) (furnished work, labor, and materials) for the defendant's benefit and with the defendant's knowledge; and

(B) the defendant knew or should have known that the (services) (work, labor, and materials) were given with the expectation of payment of reasonable value; and

(C) the defendant had a reasonable opportunity to prevent the plaintiff from giving (services) (work, labor, and materials) prior to them being rendered by the plaintiff.

(Text continued on page 487)

Chapter CV 533

DISCRIMINATION

COMMENT

Ohio laws against discrimination are generally found in R.C. Chapter 4112 and may be classified into two types, "disparate treatment" and "disparate impact."

"Disparate treatment" refers to those cases in which an individual claims intentional discrimination in employment because of membership in a protected class. For instance, an employee may claim that he was not hired because he was too old. In a "disparate treatment" case, the employee may prove the case by direct or circumstantial evidence or both. In discrimination cases, the terms "direct" and "circumstantial" have a specialized meaning. See the cases cited below.

In a circumstantial evidence case, the employee may adduce evidence, for instance, that younger people with lesser qualifications were hired instead of the employee. In a "disparate treatment" case using circumstantial evidence, the employee must prove that membership in a protected class was a determining factor in the employer's challenged conduct. See OJI-CV 533.03. In a "disparate treatment" case using direct evidence, where for instance there has been an admission of discriminatory intent, the burden of persuasion shifts to the employer to prove that the challenged job action would have occurred regardless of the discriminatory intent. See OJI-CV 533.05.

The court should make the determination at the earliest possible time whether the case is a direct evidence case. For guidance on determining what is direct evidence of discrimination, see, e.g., *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125,

1996-Ohio-307; *Wexler v. White's Furniture, Inc.* (C.A. 6, 2003) 317 F.3d 564; *Bartlik v. U.S. Dept. of Labor* (C.A. 6, 1996), 73 F.3d 100, 102-103; *Talley v. Bravo Pitino Restaurant, Ltd.* (C.A. 6, 1995), 61 F.3d 1241, 1248-49; *Manzer v. Diamond Shamrock Chem. Co.* (C.A. 6, 1994), 29 F.3d 1078, 1081; *Phelps v. Yale Security, Inc.* (C.A. 6, 1993), 986 F.2d 1020, 1025; *Terbovitz v. Fiscal Court of Adair Co.* (C.A. 6, 1987), 825 F.2d 111, 115; *Blalock v. Metals Trades, Inc.* (C.A. 6, 1985), 775 F.2d 703, 706-707, n. 5.

In a "disparate impact" case, a facially neutral employment practice causes an imbalance in the treatment of a protected class. For instance, requiring firefighters to lift one hundred fifty pounds may have the impact of discriminating or excluding on the basis of age.

CV 533.01 General *[Rev. 2/26/22]*

1. GENERAL. The plaintiff claims that the defendant discriminated against him/her by (*describe challenged conduct*) because of his/her (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*).

The defendant claims that the (*describe challenged conduct*) was not because of the plaintiff's (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*), but was because of (the plaintiff's [unsatisfactory job performance] [misconduct]) (*describe other legitimate non-discriminatory reason*).

COMMENT

Drawn from R.C. 4112.02 and The Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-2.

An "employer" means the state, any political subdivision of the state, or a person employing four or more persons within the state, and any agent of the state, political subdivision, or person. R.C. 4112.01. "Employer" does not include individual supervisors, managers, or employees, although the employer may be still be vicariously liable for the acts of individual supervisors, managers, or employees. *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636. There may, however, be individual liability under R.C. 4112. 02(J) for aiding or abetting discrimination by the employer.

Age is defined by R.C. 4112.01 as an "individual aged forty years or older." Sex has been interpreted by the Supreme Court of the United States to refer to the biological distinction between men and women, which necessarily includes homosexuality and transgender status. *Bostock v. Clayton C ty.*, 140 S. Ct. 1731 (2020). There is usually not a need for an instruction defining the protected class(es). If there is a dispute as to whether the employee is a member of a protected class, the court must define the protected class(es) in an additional instruction.

CV 533.03 Disparate treatment claim—indirect evidence *[Rev. 2/26/22]*

COMMENT

This instruction applies to a disparate-treatment claim when there is no direct evidence of discrimination. Whether direct evidence has been produced is a question of law for the court. When there is direct evidence presented, then OJI-CV 533.05 applies.

1. GENERAL. OJI-CV 533.01.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*) was a determining factor for (*describe challenged conduct*).

COMMENT

Drawn from R.C. Chapter 4112.

There is a three-step process in indirect-evidence cases for allocating burdens of production and persuasion. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Plumbers & Steamfitters v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192 (1981).

For purposes of deciding a directed verdict by the court, the *McDonnell Douglas* three-step test remains in effect, as explained in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of persuasion, however, rests at all times with the employee in indirect-evidence cases. *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986). Rather than confuse the jurors with legal definitions of the burdens of production and persuasion and how they shift under *McDonnell Douglas*, the above instruction is clear and preferable. *In re Lewis*, 845 F.2d 624 (6th Cir. 1988).

The burden of production rests first on the employee to establish a prima facie case. For example, discriminatory intent may be established indirectly if the employee proves that he/she was a member of a statutorily protected class, was qualified but was discharged and replaced by a person not belonging to the protected class, or, in cases of age discrimination, a person substantially younger. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 1996-Ohio-307 (relying on *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983)); *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, (modifying the protected-class element to a requirement that the favored employee be "substantially younger" in cases of age discrimination). If the employee establishes a prima facie case, then the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the challenged conduct. If that reason is articulated, the burden shifts back to the employee to show that the employer's reason(s) are pretextual. *McDonnell Douglas, supra. See also, Chappell, supra*; *Romans v. Mich. Dept. of*

Human Servs., 668 F.3d 826 (6th Cir. 2012).

3. DETERMINING FACTOR. "Determining factor" means that the employee's (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the employer's decision to (*describe challenged conduct*). The plaintiff need not prove that (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*) was the only reason. It is not a determining factor if the plaintiff would have been (*describe challenged conduct*) regardless of his/her (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*).

COMMENT

Cleveland Civil Service Comm. v. Ohio Civil Rights Comm., 57 Ohio St.3d 62 (1991); *Plumbers & Steamfitters, supra. See also, St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (the action complained of must have resulted from intentional discrimination). *Univ. of Texas, S.W. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

4. DISCIPLINE POLICY CASES (ADDITIONAL). The employer is not required to give the employee progressive discipline or any warning concerning job performance before (*describe challenged conduct*) can occur. Similarly, the employee has the right to end the employment relationship without any notice to the employer. However, in deciding whether an employer acted with a discriminatory reason, you may consider whether the employer followed his/her/its own policies.

5. EMPLOYMENT AT WILL—BUSINESS JUDGMENT (ADDITIONAL). The employment relationship in this case allows the employer to terminate the employee at any time for any reason, except for a discriminatory reason. It is unlawful for any employer to terminate an employee because of (race) (color) (religion) (sex) (pregnancy) (military stat us) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*). The employer claims that he/she/it acted for non-discriminatory reasons. In deciding whether an employer has acted for discriminatory reasons, you should not substitute your judgment for that of the employer, even if you would have made a different business decision.

6. CONSTRUCTIVE DISCHARGE (ADDITIONAL) OJI-CV 533.19.

7. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) BONA FIDE SENIORITY SYSTEM (AGE DISCRIMINATION CLAIMS ONLY). The defendant claims that the treatment of the plaintiff was in accordance with terms of a bona fide seniority system. If you find by the greater weight of the evidence that the defendant

(1) established a seniority system which used length of service as the primary factor for (layoffs) (promotions) (*insert other challenged action*); and

(2) the system was implemented and operated in a non-discriminatory manner, then you must find in favor of the defendant.

COMMENT

29 U.S.C. 6232(f)(2); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

(C) BONA FIDE OCCUPATIONAL QUALIFICATION. The defendant claims that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*other legally protected classification*) was part of a bona fide occupational qualification. If you find by the greater weight of the evidence that it is essential and necessary to the business that a person of a particular (race) (color) (religion) (sex) (national origin) (age) (ancestry) (*other legally protected classification including pregnancy*) be employed; and

(*Use appropriate alternative[s]*)

(1) the defendant had a factual basis for believing that all members of the excluded group would be unable to perform safely and efficiently the duties of the job involved,

(*or*)

(2) it was impossible or impracticable to make a determination of each person's qualifications in a non-discriminatory manner, then you must find in favor of the defendant.

COMMENT

Little Forest Medical Ctr. of Akron v. Ohio Civil Rights Comm., 61 Ohio St.3d 607 (1991).

8. CONCLUSION. OJI-CV Chapter 313.

9. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.

10. DAMAGES. OJI-CV 533.21.

CV 533.05 Disparate treatment claim—some direct evidence *[Rev. 2/26/22]*

COMMENT

This instruction applies to a disparate-treatment claim when there is direct evidence of discrimination. Whether direct evidence has been produced is a question of law for the court. When there is no direct evidence presented, then

OJI-CV 533.03 applies. *See* the Introductory Comment of OJI-CV 533; *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 1996-Ohio-307; *Smith v. E.G. Baldwin & Assocs.*, 119 Ohio App. 3d 410 (10th Dist. 1997).

1. GENERAL. OJI-CV 533.01.

2. PROOF OF CLAIM. Before you can find for the plaintiff, the plaintiff must prove by the greater weight of the evidence that (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*) was a determining factor for (*describe challenged conduct*).

If you find that the plaintiff has proven by the greater weight of the evidence that (*describe the direct evidence of the defendant's discriminatory conduct*), then you must find in favor of the plaintiff unless the defendant proves by the greater weight of the evidence that the plaintiff would have been (*describe challenged conduct*) independent of the plaintiff's (race) (color) (religion) (sex) (pregnancy) (military status) (national origin) (disability) (age) (ancestry) (*insert other legally protected classification*).

3. DETERMINING FACTOR. "Determining factor" means that the plaintiff's (*insert protected conduct*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the defendant's decision to (*describe challenged conduct*). The plaintiff need not prove that (*insert protected conduct*) was the only reason. It is not a determining factor if the plaintiff would have been (*describe challenged conduct*) regardless of his/her (*insert protected conduct*).

COMMENT

Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm., 57 Ohio St.3d 62 (1991); *Plumbers & Steamfitters v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192 (1981). *See also St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (the action complained of must be done because of intentional discrimination).

4. CONSTRUCTIVE DISCHARGE (ADDITIONAL) OJI-CV 533.19.

5. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) BONA FIDE SENIORITY SYSTEM (AGE DISCRIMINATION CLAIMS ONLY). The defendant claims that the treatment of the plaintiff was in accordance with terms of a bona fide seniority system. If you find by the greater weight of the evidence that the defendant

(1) established a seniority system which used length of service as the primary factor for (layoffs) (promotions) (*insert other challenged action*); and

(2) the system was implemented and operated in a non-discriminatory manner,

then you must find in favor of the defendant.

COMMENT

29 U.S.C. 623(f)(2); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

(C) BONA FIDE OCCUPATIONAL QUALIFICATION. The defendant claims that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*other legally protected classification*) was part of a bona fide occupational qualification. If you find by the greater weight of the evidence that it is essential and necessary to the business that a person of a particular (race) (color) (religion) (sex) (national origin) (age) (ancestry) (*other legally protected classification including pregnancy*) be employed; and

(*Use appropriate alternative[s]*)

(1) the defendant had a factual basis for believing that all members of the excluded group would be unable to perform safely and efficiently the duties of the job involved,

(*or*)

(2) it was impossible or impracticable to make a determination of each person's qualifications in a non-discriminatory manner,

then you must find in favor of the defendant.

COMMENT

Little Forest Medical Ctr. of Akron v. Ohio Civil Rights Comm., 61 Ohio St.3d 607 (1991).

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV 533.21.

CV 533.07 Disparate (adverse) impact claim *[Rev. 2/26/22]*

1. GENERAL. The plaintiff claims that the defendant has caused a/an (disparate) (adverse) impact on persons who are (*insert legally protected classification*). A/an (disparate) (adverse) impact is the consequence of an employment practice or decision-making process that appears neutral in its treatment of different groups but, in fact, affects one group more harshly than another group when it is actually applied. To find a/an (disparate) (adverse) impact, you do not need to find that the defendant intended to discriminate against persons who are (*insert legally protected classification*). Instead, you must focus on the consequences or results of the employment practice or

decision-making process at issue and find that they had a significantly (disparate) (adverse) or significantly disproportionate impact on persons who are (insert legally protected classification). Unless the employment practices or decision-making processes are not capable of separation, the plaintiff must identify a specific employment practice or decision-making process that caused the alleged (disparate) (adverse) impact.

2. PROOF OF CLAIM. The plaintiff claims that the defendant caused a/an (disparate) (adverse) impact on persons who are (*insert legally protected classification*). Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff is (*insert legally protected classification*); and

(B) the defendant used a specific employment practice or decision-making process that had a significantly (disparate) (adverse) or significantly disproportionate impact on persons who are (*insert legally protected classification*); and

(C) the challenged employment practice (directly) (proximately) caused the (disparate) (adverse) effect in the defendant's workforce.

COMMENT

See Griggs v. Duke Power Co., 401 U.S. 424 (1971); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

3. CONSTRUCTIVE DISCHARGE (ADDITIONAL) OJI-CV 533.19.

4. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) JOB-RELATED BUSINESS NECESSITY. The defendant claims that the (*describe challenged employment practice*) was a job-related business necessity. Before you may find for the defendant, you must find by the greater weight of the evidence that the employment practice

(1) had a clear relationship or connection to the (*describe job or position in question*); and

(2) (substantially promoted safe, efficient, or successful job performance) (was required due to economic distress).

COMMENT

The "job-related business necessity" test does not apply to cases of age discrimination. However, a reasonable factor other than age may be used by the employer as an affirmative defense. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008).

(C) SUITABLE ALTERNATIVE (ADDITIONAL). The plaintiff claims that the defendant had a suitable alternative employment practice that would have resulted in a less adverse impact that the defendant refused to adopt. "Suitable alternative" employment practice means one that would also have substantially promoted safe, efficient, or successful job performance.

COMMENT

Drawn from *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir.1981).

(D) BONA FIDE SENIORITY SYSTEM (AGE DISCRIMINATION CLAIMS ONLY). The defendant claims that the treatment of the plaintiff was in accordance with terms of a bona fide seniority system. If you find by the greater weight of the evidence that the defendant

(1) established a seniority system which used length of service as the primary factor for (layoffs) (promotions) (*insert other challenged action*); and

(2) the system was implemented and operated in a non-discriminatory manner,

then you must find in favor of the defendant.

COMMENT

29 U.S.C. 6232(f)(2); *Morelock v. NCR Corp.*,. 586 F.2d 1096 (6th Cir. 1978).

5. CONCLUSION. OJI-CV Chapter 313.
6. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.
7. PROXIMATE CAUSE. OJI-CV Chapter 405.
8. DAMAGES. OJI-CV 533.21.

CV 533.09 Disability discrimination *[Rev. 2/26/22]*

COMMENT

For an overview of disability discrimination, see generally *Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259; *Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm.*, 57 Ohio St.3d 62 (1991); *Hazlett v. Martin Chevrolet*, 25 Ohio St.3d 279 (1986); *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm.*, 58 Ohio App.3d 20 (8th Dist.1989).

1. GENERAL. OJI-CV 533.01.

COMMENT

In cases where the employee claims that the defendant failed to accommodate his/her disability, see OJI-CV 533.11.

2. PROOF OF CLAIM. The plaintiff claims that the defendant discriminated against him/her because he/she (had) (had a record of) (was regarded as having) a disability. The defendant denies that (the plaintiff was disabled) (he/she/it discriminated against the plaintiff because of the claimed disability). Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff (had) (had a record of) (was regarded as having) a physical or mental impairment that substantially limits one or more major life activities; and

(B) the plaintiff was qualified for the position of (*insert job title*) because he/she satisfied the skill, experience, education, and other job-related requirements for the position; and

(C) the plaintiff could perform

(*Use appropriate alternative[s]*)

(1) the essential functions of the position of (*insert job title*); and

(*or*)

(2) the essential functions of the position of (*insert job title*) with reasonable accommodation; and

(D) the plaintiff's disability was a determining factor in the defendant's decision to (*describe challenged conduct*).

3. PHYSICAL OR MENTAL IMPAIRMENT.

(A) "Physical or mental impairment" includes any of the following:

(*Use appropriate alternative[s]*)

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine system;

(*or*)

(2) any mental or psychological disorder, including, but not limited to, intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(*or*)

(3) diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, intellectual disability, emotional illness, drug addiction, and alcoholism.

(B) The term "physical or mental impairment" does not include any of the following:

(*Use appropriate alternative[s]*)

(1) (homosexuality) (bisexuality);

(*or*)

(2) (transvestism) (transsexualism) (pedophilia) (exhibitionism) (voyeurism) (gender identity disorders not resulting from physical impairments) (*describe other sexual behavior disorder*);

(*or*)

(3) (compulsive gambling) (kleptomania) (pyromania);

(*or*)

(4) psychoactive substance use disorders resulting from current illegal use of a controlled substance or the current use of alcoholic beverages.

COMMENT

Drawn from R.C. 4112.01. Depending on the facts involved, the trial court may need to draft additional instructions defining the foregoing terms.

4. DISABILITY. A "disability" is a physical or mental impairment that substantially limits one or more major life activities. Major life activities include, but are not limited to, (caring for oneself) (performing manual tasks) (seeing) (hearing) (eating) (sleeping) (walking) (standing) (lifting) (bending) (speaking) (breathing) (learning) (reading) (concentrating) (thinking) (communicating) (working) (*describe other major life activity*).

COMMENT

Drawn from R.C. 4112.01 and ADA Amendments Act of 2008, 42 U.S.C. 12102(a)(1) and (2).

5. SUBSTANTIALLY LIMITING. A physical or mental impairment "substantially limits" one or more of a person's major life activities when it

(*Use appropriate alternative[s]*)

(A) renders a person unable to perform a major life activity that the average person could perform;

(*or*)

(B) significantly restricts, as to condition, manner, or duration, the person's ability to perform a particular major life activity as compared to the condition, manner, or duration under which the average person could perform the same major life activity.

COMMENT

Drawn from ADA Amendments Act of 2008, 42 U.S.C.12102(a)(4)); *Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259; 29 C.F.R. 1630.2(j), (i), and (ii).

6. EFFECT OF ASSISTIVE MEASURES (ADDITIONAL). In deciding whether the plaintiff is disabled, you must not consider the plaintiff's condition after the effect of any assistance from (medicines) (prosthetic devices) (*describe other assistive measures*) used by the plaintiff.

COMMENT

The ameliorative effects of the mitigating measures of ordinary eyeglasses and contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. 42 U.S.C.12102 Sec. 3(4)(E)(ii).

7. EFFECT OF IMPAIRMENT. Whether the plaintiff has a physical or mental impairment should not be based on the name or mere diagnosis of the impairment. Rather, it depends upon the effect the impairment has on the plaintiff's life. A condition that is not disabling for one person may be disabling for another.

COMMENT

R.C. 4112.01(A)(16); 29 C.F.R. 1630.2(h); 56 Fed. Reg. 35,741 (1991); *Toyota v. Williams*, 534 U.S. 184 (2002); *Hentze v. CSX Transportation, Inc.*, 477 F. Supp. 3d 644, 660 (S.D. Ohio 2020) (discussing the impact of the 2008 Amendment on Ohio and federal disability discrimination, and noting that, "caselaw makes clear that it is the plaintiff's obligation to identify both the impairment at issue and the major life activity that it impacts, along with offering an explanation as to the way in which the major life activity is substantially limited"); *See also Medlin v. Springfield Metro. Hous. Auth.*, 2010-Ohio-3654, n.6 (Ct. App.) (explaining that although *Toyota* was superseded by the passage of the ADA Amendment of 2008, "the Congressional Findings and Purposes accompanying Pub.L. 110–325, 122 Stat 3553 do not indicate an intent to supersede *Toyota's* direction to consider cases individually. Congress, instead, was primarily concerned with *Toyota's* overly restrictive definitions of the terms "substantially" and "major." *See* Pub.L. 110–325, § 2(b)."); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir.1993) (cited favorably in *Columbus Civ. Serv. Comm. v. McGlone*, 697 N.E.2d 204, 207 (Ohio 1998)).

8. RECORD OF AN IMPAIRMENT (ADDITIONAL). The plaintiff has a record of an impairment if he/she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Many types of records might contain this information, including medical, educational, or employment records. The plaintiff may have a record of an impairment even though he/she has (recovered from a physical or mental impairment that previously limited a major life activity) (been misclassified as having a mental or physical impairment that substantially limits one or more major life activities).

COMMENT

Drawn from 42 U.S.C. 12102 (2) (B)–(C); *Vaughan v. Harvard Indus., Inc.*, 926 F. Supp. 1340 (W.D. Tenn.1996); *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir.2000); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307 (6th Cir. 2001).

9. REGARDED AS HAVING AN IMPAIRMENT (ADDITIONAL). The plaintiff meets the requirement of being regarded as having an "impairment" if he/she establishes that he/she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits, or is perceived to limit, a major life activity.

COMMENT

Drawn from 42 U.S.C. 12102(a)(3).

10. ESSENTIAL FUNCTIONS. "Essential functions" are the fundamental duties of the job, as opposed to marginal duties of the job. If you find that employees are not actually required to perform the function in the job, it is not an essential function. If you find that the job function is actually required to be performed by employees in the job,

(A) you must consider the following factors in deciding whether the job function is essential:

(*Use appropriate alternative[s]*)

(1) the position exists to perform the function;

(*or*)

(2) there are a limited number of other employees available to perform the function, or among whom the function can be distributed;

(*or*)

(3) a function is highly specialized and the person in the position is hired for special expertise or ability to perform it.

(B) In addition, you may, but are not required to, consider the following factors when deciding whether a particular job function is essential:

(*Use appropriate alternative[s]*)

(1) the defendant's judgment as to which functions are essential;

(*or*)

(2) written job descriptions prepared before advertising the position or interviewing applicants for the position;

(*or*)

(3) the amount of time the employee must spend performing the function;

(*or*)

(4) the consequences of not requiring the employee to perform the function;

(*or*)

(5) the work experience of past employees in the job;

(*or*)

(6) the current work experience of employees in similar jobs;

(*or*)

(7) all other facts and circumstances in evidence.

COMMENT

29 C.F.R. 1630.2(n); 56 Fed. Reg. 35.743 (1991); H.R. Conf. Rep. No. 101-596, 101st Cong., 2nd Sess. 58 (1990); *Hall v. United States Postal Serv.*, 857 F.2d 1073 (6th Cir. 1988).

11. REASONABLE ACCOMMODATION. OJI-CV 533.11.

COMMENT

If reasonable accommodation is an issue in the case, the court should read all applicable portions of OJI-CV 533.11.

12. DETERMINING FACTOR. "Determining factor" means that the plaintiff's (*insert protected conduct*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the defendant's decision to (*describe challenged conduct*). The plaintiff need not prove that (*insert protected conduct*) was the only reason. It is not a determining factor if the plaintiff would have been (*describe challenged conduct*) regardless of his/her (*insert protected conduct*).[JH1]

COMMENT

Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm., 57 Ohio St.3d 62 (1991); *Plumbers & Steamfitters v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192 (1981). *See also St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (the action complained of must be done because of intentional discrimination).

13. CONSTRUCTIVE DISCHARGE (ADDITIONAL) OJI-CV 533.19.

14. CONCLUSION. OJI-CV Chapter 313.

15. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.

16. PROXIMATE CAUSE. OJI-CV Chapter 405.

17. DAMAGES. OJI-CV 533.21.

CV 533.11 Reasonable accommodation *[Rev. 2/26/22]*

1. GENERAL. An employer must make a reasonable accommodation for an (employee's) (applicant's) disability, so long as the accommodation does not impose an undue hardship on the operation of the business.

The plaintiff claims that, with reasonable accommodation, he/she could have performed the essential functions of the position of (insert job title). The defendant (denies that he/she/it [describe challenged conduct]) (claims that he/she/it made a reasonable accommodation) (claims that there was no reasonable accommodation he/she/it could have made without undue hardship to the operation of the business).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff (has) (has a record of) (is regarded as having) a (physical) (mental) impairment that substantially limits one or more major life activities; and

(B) he/she was qualified for the position of (*insert job title*) because he/she satisfies the skill, experience, education, and other job-related requirements for the position; and

(C) he/she can perform the essential functions of the position of (*insert job title*) with reasonable accommodation; and

(D) the plaintiff requested that the defendant accommodate his/her disability; and

COMMENT

Generally, the employee must request an accommodation. However, where facts arise that give notice to an employer that an accommodation is necessary without a specific request from an employee, the law is unsettled as to whether a specific

request is necessary. *Stanciel v. Donahoe*, 570 Fed. Appx. 578 (6th Cir. 2014).

(E) the defendant failed to reasonably accommodate the plaintiff's disability.

3. REASONABLE ACCOMMODATION. "Reasonable accommodation" means modification to or adjustment of the work environment, or to the manner or circumstances under which a job is customarily held or performed. "Reasonable accommodation" is best understood as a means by which obstacles to the equal employment opportunity of an individual with a disability are removed or lessened. "Reasonable accommodation" may include

(*Use appropriate alternative[s]*)

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

(*or*)

(B) job restructuring;

(*or*)

(C) part-time or modified work schedules;

(*or*)

(D) appropriate modifications of examinations, training materials, or policies;

(*or*)

(E) the provision of qualified readers or interpreters;

(*or*)

(F) reassignment to a vacant position for which the employee is qualified (but an employer is not required to create another job);

COMMENT

Drawn from 56 Fed. Reg. 35,744 (1991); Section 1630.2(o), Title 29 C.F.R.; *School Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273 (1987). For the interplay between collective bargaining and reassignment, see *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997); *Eckles v. Consol. Rail*, 94 F.3d 1041 (7th Cir. 1996); *Benson v. Northwest Airlines*, 62 F.3d 1108 (8th Cir. 1995); *Emrick v. Libbey-Owens Ford Corp.*, 875 F. Supp. 393 (E.D. Tex. 1995).

(*or*)

(G) (*describe similar accommodations*).

COMMENT

Drawn from R.C. 4112.02(N)(2)(f); Americans with Disabilities Act, 42 U.S.C.

12111(g); 29 C.F.R. 1630.2(o); *Wooten v. City of Columbus*, 91 Ohio App.3d 326 (1993); *Sizemore v. Dept. of Rehab. & Corr.*, 63 Ohio Misc.2d 319 (1992).

4. CONSTRUCTIVE DISCHARGE (ADDITIONAL). OJI-CV 533.19.

5. AFFIRMATIVE DEFENSES:

(*Use appropriate alternative(s)*)

(A) GENERAL. OJI-CV 303.03 § 4.

(B) IMPOSSIBILITY. The defendant claims that there was no accommodation he/she/it could have made that would have enabled the plaintiff to perform the essential functions of the job. If you find by the greater weight of the evidence that there was no accommodation that would have enabled the plaintiff to perform the essential functions of the job, you must find for the defendant.

(C) UNDUE HARDSHIP. The defendant claims that the possible accommodation(s) would impose an undue hardship on the operation of the defendant's business. "Undue hardship" means significant difficulty and expense incurred by the defendant. In determining whether an accommodation would have imposed an undue hardship, you may consider

(*Use appropriate alternative(s)*)

(1) the nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding;

(*or*)

(2) the financial resources of the defendant's facility or facilities involved in the provision of the accommodation, the number of persons employed at such facility, and the effect on the defendant's expenses and resources;

(*or*)

(3) the financial resources of the defendant as a whole, the overall size of the business with respect to its total number of employees, and the number, type, and location of its facilities;

(*or*)

(4) the type of operation or operations of the defendant, including the composition, structure, and functions of the work force, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the defendant;

(*or*)

(5) the impact of the accommodation upon the operation of the facility involved, including the impact on the ability of the other employees to perform their duties and the impact on the facility's ability to conduct business.

If you find by the greater weight of the evidence that the possible accommodation(s)

would have imposed an undue hardship on the defendant, you must find for the defendant.

COMMENT

R.C. 4112.02(N)(2)(f); 42 U.S.C. 12111(10)(b); Section 1630.15(d), Title 29, C.F.R; *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm.*, 58 Ohio App.3d 20 (1989).

(D) BONA FIDE OCCUPATIONAL HAZARD. The defendant claims that the plaintiff's (continued) employment would have significantly increased the occupational hazards affecting the plaintiff, other employees, the general public, or the facilities in which the work was to be performed. The defendant is not required to employ a disabled person under circumstances that would significantly increase occupational hazards.

If you find by the greater weight of the evidence that plaintiff's (continued) employment would have significantly increased the occupational hazards affecting the plaintiff, other employees, the general public, or the facilities in which the work was to be performed, you must find for the defendant.

COMMENT

Drawn from R.C. 4112.02(K); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), Ohio Adm.Code 4112-5-08(D)(3); *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm.*, 58 Ohio App.3d 20 (1989).

6. CONCLUSION. OJI-CV Chapter 313.
7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.
8. PROXIMATE CAUSE. OJI-CV Chapter 405.
9. DAMAGES. OJI-CV 533.21.

CV 533.13 Sexual harassment—loss of tangible job benefit *[Rev. 2/26/22]*

COMMENT

This instruction is intended for use only in cases in which it is alleged that a tangible job benefit was denied or threatened to be denied on account of sex. The concept of tangible job benefit includes, but is not limited to, the employee being terminated, fired, demoted, or not hired. Constructive discharge also constitutes a loss of a tangible job benefit. Constructive discharge in a sexual harassment case involves the employee choosing to leave the employment because of the sexual harassment. In a case involving constructive discharge, the jury should first answer an interrogatory on whether constructive discharge occurred. *See* OJI-CV 533.23,

which describes constructive discharge as a forced separation. If constructive discharge occurred, further interrogatories may inquire as to whether the additional elements of this claim are present. If constructive discharge is not present, and no other tangible job benefit was lost or threatened, then this form of sexual harassment claim cannot be maintained. Although the Committee takes no position, at least one court has determined that a constructive discharge is not a denial of a tangible job benefit if it was caused by co-workers and not ratified or approved by supervisors. *Caridad v. Metro-North Commuter Railroad,* 191 F.3d 283 (2d Cir. 1999), *cert. denied,* 120 S.Ct. 1959 (2000).

If sexual harassment is committed by a peer or lower- level employee, then the employer can only be liable on the basis of the liability defined in the instruction on hostile work environment, which is a separate claim. *See* OJI-CV 533.17.

1. GENERAL. The plaintiff claims that (*insert name[s] of defendant[s]*) engaged in sexual harassment that caused him/her to (*describe claimed tangible job benefit lost*).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) (*insert name[s] of defendant[s]*)

(*Use appropriate alternative[s]*)

(1) gave or promised to give a tangible job benefit in exchange for submission to unwelcome sexual demands;

(*or*)

(2) penalized or threatened to penalize the plaintiff for refusing to submit to unwelcome sexual demands;

(B) and (*insert name[s] of defendant[s]*) had the (actual) (apparent) authority to (give or deny tangible job benefits) (penalize the plaintiff) (hire) (fire) (set working terms or conditions).

3. SEXUAL HARASSMENT. "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, and other unwelcome conduct of a sexual nature.

COMMENT

Drawn from Ohio Adm.Code 4112-5-05(J)(1).

4. KNOWLEDGE OF EMPLOYER. The plaintiff does not need to prove that the defendant had knowledge of the harassment to prevail on this form of sexual harassment. The plaintiff must, however, prove that (*insert name[s] of alleged harasser[s]*) had the (express) (apparent) authority to (give or deny tangible job benefits) (penalize the plaintiff) (hire) (fire) (set working terms or conditions).

5. EXPRESS AUTHORITY (ADDITIONAL). OJI-CV 423.01 § 6.

6. APPARENT AUTHORITY (ADDITIONAL). OJI-CV 423.01 § 7.

COMMENT

Highlander v. KFC Natl. Mgt., 805 F.2d 644 (6th Cir. 1986).

7. EMPLOYER LIABILITY FOR SEXUAL HAR ASSMENT BY A SUPERVISOR (WITH LOSS OF TANGIBLE JOB BENEFITS). The employer is liable for the conduct of (*insert name[s] of alleged harasser[s]*) if the conduct occurred in the scope of employment of (*insert name[s] of alleged harasser[s]*). Where an employee is able to sexually harass another employee because of the authority vested in him/her by the employer, then the harassment took place within the scope of his/her employment. If you find by the greater weight of the evidence that (*insert name[s] of alleged harasser[s]*) completed acts of sexual harassment within the scope of his/her employment, then you may find the employer liable for the conduct.

COMMENT

Kerans v. Porter Paint Co., 61 Ohio St.3d 486 (1991).

8. CONSTRUCTIVE DISCHARGE (ADDITIONAL). OJI-CV 533.19.

9. CONCLUSION. OJI-CV Chapter 313.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV 533.21.

CV 533.15 Sexual harassment—hostile work environment *[Rev. 2/26/22]*

COMMENT

These instructions can be adapted to cases alleging a hostile work environment based on race or other legally protected classifications.

1. GENERAL. The plaintiff claims that he/she has been subjected to a hostile work environment because of sexual harassment.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the plaintiff was subjected to sexual harassment that was so severe or (pervasive) (extensive) that it permeated the work environment and altered the conditions of the plaintiff's employment, creating a hostile work environment.

3. SEXUAL HARASSMENT. "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, or other unwelcome conduct of a sexual nature.

COMMENT

Drawn from Ohio Adm.Code 4112-5-05 (J) (1).

4. "HOSTILE WORK ENVIRONMENT" FACTORS. In deciding whether the claimed sexual harassment created a hostile work environment, you must consider all of the circumstances including the following factors if applicable:

(A) the physical environment of the plaintiff's work area;

(B) the reasonable expectations of the plaintiff upon entering the work environment;

(C) the nature of the unwelcome sexual acts or words;

(D) whether the sexual acts or words occurred one time or repeatedly;

(E) the seriousness of the conduct;

(F) the context in which the sexual harassment occurred;

(G) whether the conduct was verbal, physical, or both;

(H) whether the conduct was merely an isolated utterance or incident;

(I) whether the conduct unreasonably interfered with the plaintiff's work performance;

(J) whether the alleged harasser was a co-worker or supervisor;

(K) whether others joined in the harassment; and

(L) whether the harassment was directed at more than one person.

COMMENT

Harris v. Forklift Systems, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

5. REASONABLE PERSON STANDARD. In deciding whether a hostile work environment existed, you must consider the evidence from the point of view of a reasonable person in the same or similar circumstances as the plaintiff. You must evaluate all of the circumstances and determine whether the alleged harassing behavior is the kind of behavior that would create a hostile work environment for a reasonable person. You should not consider the evidence from the point of view of an overly sensitive person. The employee must also believe that he/she was subjected to a hostile work environment.

COMMENT

Drawn from *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

6. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT WITHOUT LOSS OF TANGIBLE JOB BENEFIT. An employer may be liable for failing to take corrective action against another employee who created a hostile work environment for the plaintiff. You shall find the employer liable if you find by the greater weight of the evidence that the plaintiff has been subjected to hostile work environment sexual harassment and

(*Use appropriate alternative[s]*)

(A) (*insert name of alleged harasser*) has a past history of sexually harassing behavior about which the defendant knew or should have known and the defendant failed to take prompt or effective remedial action;

(*or*)

(B) the defendant knew or should have known about the harassment against the plaintiff and the defendant failed to take prompt or effective remedial action.

COMMENT

Kerans v. Porter Paint Co., 61 Ohio St.3d 486 (1991); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

For cases involving sexual harassment by a non-employee, see Ohio Adm.Code 4112-5-05(J)(5); *Anania v. Daubenspeck Chiropractic*, 129 Ohio App.3d 516 (2d Dist.1998); *Gliatta v. Tectum, Inc.*, 211 F. Supp.2d 992 (S.D. Ohio 2002).

7. CONSTRUCTIVE DISCHARGE (ADDITIONAL). OJI-CV 533.19.

8. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CORRECTIVE ACTION. The defendant claims that he/she/it is not liable to the plaintiff. If the defendant proves by the greater weight of the evidence that

(1) the defendant exercised reasonable care to prevent or promptly correct any sexually harassing behavior; and

(2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the defendant or to otherwise avoid harm,

then you must find for the defendant.

COMMENT

Drawn from R.C. 4112.054(B). This is an affirmative defense for the employer which applies only to cases in which no tangible employment action, such as discharge, demotion, or undesirable reassignment, occurs. *See* R.C. 4112.054(C);

Faragher v. City of Boca Raton, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV 533.21.

CV 533.17 Retaliation *[Rev. 2/26/22]*

1. GENERAL. An employer may not retaliate against an employee who (opposed any unlawful discriminatory practice) ([made a charge] [testified] [assisted] [participated in any manner] in any investigation, proceeding, or hearing concerning discrimination) (*insert other protected conduct*).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant intended to retaliate when he/she/it (*insert challenged job action*). The plaintiff need not prove that the sole purpose of (*insert challenged job action*) was retaliation. It is sufficient that the plaintiff prove that retaliation was a determining factor in (*insert challenged job action*).

COMMENT

R.C. 4112.02(I); *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442; *Cooper v. City of North Olmsted*, 795 F.2d 1265 (6th Cir.1986); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370 (6th Cir.1984).

3. DETERMINING FACTOR. "Determining factor" means that the plaintiff's (*insert protected conduct*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the defendant's decision to (*describe challenged conduct*). The plaintiff need not prove that (*insert protected conduct*) was the only reason. It is not a determining factor if the plaintiff would have been (*describe challenged conduct*) regardless of his/her (*insert protected conduct*).

COMMENT

Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm., 57 Ohio St.3d 62 (1991); *Plumbers & Steamfitters v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192 (1981). *See also St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (the action complained of must be done because of intentional discrimination).

4. REASONABLE BELIEF. The plaintiff must have a reasonable belief that the defendant engaged in a discriminatory employment practice before the plaintiff (*insert protected conduct*), whether or not the defendant did, in fact, engage in a discriminatory

employment practice. The issue is not whether the defendant actually engaged in a discriminatory employment practice. "Reasonable belief" means that belief which would be held by a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances.

COMMENT

The Committee believes that the objective standard of reasonableness is required under the syllabus in *Fox v. City of Bowling Green*, 76 Ohio St.3d 534, 1996-Ohio-104.

5. KNOWLEDGE (OPTIONAL). The defendant must have had knowledge that the plaintiff (*insert protected conduct*) before the defendant (*describe challenged conduct*).

6. AGENCY. OJI-CV Chapter 423.

COMMENT

Where there is a question of whether the employer is liable for the act of a co-employee, not a supervisor, or whether the employer is charged with knowledge, the court must instruct on agency.

7. CONSTRUCTIVE DISCHARGE (ADDITIONAL). OJI-CV 533.19.

8. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CORRECTIVE ACTION. The defendant claims that he/she/it is not liable to the plaintiff. If the defendant proves by the greater weight of the evidence that

(1) the defendant exercised reasonable care to prevent or promptly correct any retaliatory behavior; and

(2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the defendant or to otherwise avoid harm,

then you must find in favor of the defendant.

COMMENT

Strouss v. Mich. Dept. of Corrections, 250 F.3d 336 (6th Cir. 2001).

(C) BONA FIDE SENIORITY SYSTEM. The defendant claims that the treatment of the plaintiff was in accordance with terms of a bona fide seniority system. If you find by the greater weight of the evidence that

(1) the defendant established a seniority system which used length of service as the

primary factor for (layoffs) (promotions) (*insert other challenged action*); and

(2) the system was implemented and operated in a non-discriminatory manner,

then you must find in favor of the defendant.

COMMENT

29 U.S.C. 623(f)(2); *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir. 1978).

(D) BONA FIDE OCCUPATIONAL QUALIFICATION. The defendant claims that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*other legally protected classification*) was part of a bona fide occupational qualification. If you find by the greater weight of the evidence that it is essential and necessary to the business that a person of a particular (race) (color) (religion) (sex) (national origin) (age) (ancestry) (*other legally protected classification including pregnancy*) be employed; and

(*Use appropriate alternative[s]*)

(1) the defendant had a factual basis for believing that all members of the excluded group would be unable to perform safely and efficiently the duties of the job involved,

(*or*)

(2) it was impossible or impracticable to make a determination of each person's qualifications in a non-discriminatory manner,

then you must find for the defendant.

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 313.05.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV 533.21.

CV 533.19 Constructive discharge *[Rev. 2/26/22]*

COMMENT

This instruction applies in discrimination and retaliation cases where the plaintiff also claims that he/she was forced to resign or leave due, in whole or in part, to discriminatory employment practices. "Constructive discharge" must exist in conjunction with some discriminatory behavior and is not an independent claim for relief. *Huston v. Mittal Steel USA*, 2006 U.S. Dist. Lexis 67323.

1. GENERAL. The plaintiff (resigned) (left his/her job) and claims that he/she was constructively discharged by the defendant. The defendant claims that the plaintiff voluntarily (resigned) (left the job).

2. PROOF OF CONSTRUCTIVE DISCHARGE. Before you can find that the plaintiff was constructively discharged, you must find by the greater weight of the evidence that the defendant, regardless of his/her/its intent, made the plaintiff's working conditions so difficult and unpleasant that a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances would feel compelled to resign or leave employment.

COMMENT

Mauzy v. Kelly Services, Inc., 75 Ohio St.3d 578, 1996-Ohio-265; *United Parcel Serv. v. Ohio Civil Rights Comm.*, 71 Ohio App.3d 146 (1991); *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.*, 64 Ohio App.3d 480 (1990).

CV 533.21 Damages in discrimination cases *[Rev. 2/26/22]*

1. DAMAGES. OJI-CV Chapter 315.

COMMENT

Caps on non-economic damages apply to civil employment actions for unlawful discriminatory practices brought under sections 4112.052 and 4112.14 of the Ohio Revised Code. *See* OJI-CV 315.01 (claims arising on and after 4/7/05) § 8.

2. BACK PAY (ADDITIONAL). If you find for the plaintiff, he/she is entitled to recover lost wages and benefits, including any increases in wages or benefits lost because of (discrimination) (retaliation). The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the (*insert challenged job action*) to the present. You may include all forms of compensation that the plaintiff proved he/she would have earned, but for (*insert challenged job action*), including salary, bonuses, vacation pay, pension, health insurance and other benefits. (In determining the amount of any back pay, you must deduct the amount of wages and benefits received from replacement income during the period of back pay awarded.)

COMMENT

Back pay only applies in cases where there are alleged economic losses including, e.g., failure to promote and actual or constructive discharge cases.

R.C. 4112.99 provides, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief. Except as otherwise provided in division (B) of this section, a person may bring such a civil action in a court of competent jurisdiction."

3. FRONT PAY (ADDITIONAL). If you find for the plaintiff, you shall consider an

award of front pay. Front pay includes the amount the plaintiff would have earned from the date of the verdict until the date you find the plaintiff's loss of future pay and benefits will cease. The purpose of front pay is to temporarily compensate the plaintiff while he/she seeks comparable employment and not to give long-term compensation from the present to retirement. In deciding the amount of front pay, if any, to award, you may consider the following:

(A) the age of the plaintiff and his/her reasonable prospects of obtaining comparable employment elsewhere; and

(B) the plaintiff's salary and (*specify other tangible benefits such as bonuses and vacation pay*); and

(C) the plaintiff's expenses associated with finding new employment; and

(D) the replacement value of the plaintiff's fringe benefits until comparable fringe benefits are obtained or for a reasonable length of time.

In determining the amount of front pay, you must deduct the amount of wages and benefits you believe will be received from replacement income during the period of front pay awarded.

COMMENT

Front pay only applies in cases where there are alleged economic losses including, e.g., failure to promote and actual or constructive discharge cases.

As to front pay, reinstatement is the preferred remedy, if appropriate. Reinstatement is an equitable remedy in the discretion of the trial court. Absent an agreement between the parties concerning reinstatement, the court may wish to have the issue of front pay decided by the jury before making any decision about reinstatement. *See Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241 (1989).

Although the damages must be proven with reasonable certainty, the employee is not required to prove with precision the amount of lost earnings, if any, due him/her. Any uncertainties in the amount the employee could have earned should be resolved against the employer. *Ohio Civil Rights Comm. v. Ingram*, 69 Ohio St.3d 89, 1994-Ohio-515.

4. FAILURE TO MITIGATE. The plaintiff has a duty to use reasonable diligence to find comparable employment. If the defendant proves by the greater weight of the evidence that (comparable employment was passed up by) (the plaintiff failed to use reasonable diligence to find employment and that comparable employment was available to) the plaintiff, then you must subtract the amount of pay that the plaintiff should have earned from any award of back pay or front pay. Comparable employment need not be identical in responsibility or compensation but must be a type of work that a reasonable person would take if in the position of the plaintiff.

COMMENT

See Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614 (6th Cir. 1983).

(Text continued on page 585)

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